2248 From Mr Erskine
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Never before printed.

THE RIGHTS OF JURIES VINDICATED.

THE

SPEECHES

OF THE

DEAN OF St. ASAPH's COUNSEL,

IN THE

COURT OF KING's BENCH, WESTMINSTER,

ON THE 15TH OF NOVEMBER, 1784,

IN SHEWING CAUSE

WHY A NEW TRIAL SHOULD BE GRANTED,

THE RULE FOR WHICH HAD BEEN APPLIED FOR ON THE MOTION OF THE

HONble. THOMAS ERSKINE,

THE PRECEDING MONDAY.

TAKEN IN SHORT HAND BY

WILLIAM BLANCHARD.

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M.DCC.LXXXV.

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ADVERTISEMENT.

MR. BLANCHARD intends to publiſh the whole proceedings in the cauſe of the DEAN OF ST. ASAPH, but finding them too voluminous to be ready within a convenient time, he has determined, in the interval, to give the public the ſpeeches of the Dean's Counſel in reply upon the laſt argument in the Court of King's Bench, on the motion for the new trial. The attention of the public having been attracted in an extraordinary degree to the queſtion which this cauſe has brought forward, it was thought that the following ſpeeches, which contain the whole ſubſtance of the arguments in favour of juries, printed ſeparately, would be acceptable to the public.

THE HONble T. ERSKINE IN REPLY.

I AM now to have the honour to addreſs myſelf to your Lordſhip, in ſupport of the rule granted to me by the court upon Monday laſt, which, as Mr. Bearcroft has truly ſaid, and ſeemed to mark the obſervation with peculiar emphaſis, is a rule for a new trial. Much of my argument, according to his notion, points another way; whether its direction be true, or its force adequate to the object, it is now my buſineſs to ſhew.

In riſing to ſpeak at this time, I feel all the advantage conferred by the reply over thoſe whoſe arguments are to be anſwered; but I feel a diſadvantage likewiſe which muſt ſuggeſt itſelf to every intelligent mind.

In following the objections of ſo many learned perſons, offered in different arrangements upon a ſubject ſo complicated and comprehenſive, there is much danger of being drawn from that method and order which can alone faſten conviction upon unwilling minds, or drive them from the ſhelter which ingenuity never fails to find in the labyrinth of a deſultory diſcourſe.

The ſenſe of that danger, and my own inability to ſtruggle againſt it, led me originally to deliver to the court, certain written and maturely conſidered propoſitions, from the eſtabliſhment of which, I reſolved not to depart, or to be removed, either in ſubſtance or in order, in any ſtage of the proceedings, and by which I muſt therefore this day, unqueſtionably ſtand or fall.

Purſuing this ſyſtem I am vulnerable two ways, and in two ways only. Either it muſt be ſhewn that my propoſitions are not valid in law, or admitting their validity, that the learned judge's charge to the jury at Shrewſbury was not repugnant to them: there can be no other poſſible objections to my application for a new trial.

My duty to day is therefore, obvious and ſimple; it is, firſt, to re-maintain thoſe propoſitions; and then to ſhew, that the charge delivered to the jury at Shrewſbury was founded upon the abſolute denial and reprobation of them.

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I begin therefore, by ſaying again in my own original words, that when a bill of indictment is found, or an information filed, charging any crime or miſdemeanor known to the law of England, and the party accuſed puts himſelf upon the country by pleading the general iſſue, not guilty:—the jury are GENERALLY charged with his deliverance from that CRIME, and not SPECIALLY from the fact or facts, in the commiſſion of which the indictment or information charges the crime to conſiſt; much leſs from any ſingle fact, to the excluſion of others charged upon the ſame record.

Secondly, That no act which the law in its general theory holds to be criminal, conſtitutes in itſelf a crime abſtracted from the miſchievous intention of the actor. And that the intention, even where it becomes a ſimple inference of legal reaſon from a fact or facts eſtabliſhed, may, and ought to be collected by the jury, with the judge's aſſiſtance. Becauſe the act charged, though eſtabliſhed as a fact in a trial *on the general iſſue*, does not neceſſarily and unavoidably eſtabliſh the criminal intention by any ABSTRACT concluſion of law; the eſtabliſhment of the fact being ſtill no more than full evidence of the crime, but not the crime itſelf; unleſs the jury render it ſo themſelves, by referring it voluntarily to the court by ſpecial verdict.

Theſe two propoſitions, though worded with cautious preciſion, and in technical language, to prevent the ſubtlety of legal diſputation in oppoſition to the plain underſtanding of the world, neither do nor were intended to convey any other ſentiment than this, viz. that in all caſes where the law either directs or permits a perſon accuſed of a crime to throw himſelf upon a jury for deliverance, by pleading *generally* that he is not guilty; the jury, thus legally appealed to, may deliver him from the accuſation by a general verdict of acquittal (founded as in common-ſenſe it evidently muſt be) upon an inveſtigation as general and comprehenſive as the charge itſelf from which it is a general deliverance.

Having ſaid this, I freely confeſs to the court, that I am much at a loſs for any further illuſtration of my ſubject; becauſe I cannot find any matter by which it might be further illuſtrated, ſo clear, or ſo indiſputable, either

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in fact or in law, as the very propoſition itſelf which upon this trial has been brought into queſtion.

Looking back upon the ancient conſtitution, and examining with painful reſearch the original juriſdictions of the country, I am utterly at a loſs to imagine from what ſources theſe novel limitations of the rights of juries are derived. Even the bar is not yet trained to the diſcipline of maintaining them. My learned friend, Mr. Bearcroft, ſolemly abjures them: he repeats to day what he avowed at the trial, and is even jealous of the imputation of having meant leſs than he expreſſed; for, when ſpeaking this morning of the *right* of the jury to judge of the whole charge, your lordſhip corrected his expreſſion, by telling him he meant the *power*, and not the *right*; he caught inſtantly at your words, diſavowed your explanation, and, with a conſiſtency which does him honour, declared his adherence to his original admiſſion in its full and obvious extent.

"I did not mean," ſaid he, "merely to acknowledge "that the jury have the *power*; for their power nobody "ever doubted, and, if a judge was to tell them they "had it not, they would only have to laugh at him, "and convince him of his error, by finding a general "verdict which muſt be recorded: I meant, therefore, "to conſider it as a *right*, as an important privilege, and "of great value to the conſtitution."

Thus Mr. Bearcroft and I are perfectly agreed, I never contended for more than he has voluntarily conceded. I have now his expreſs authority for repeating, in my own former words, that the jury have not merely the *power* to acquit, upon a view of the whole charge, without controul or puniſhment, and without the poſſibility of their acquittal being annulled by any other authority; but that they have *a conſtitutional legal right to do it*; *a right fit to be exerciſed*; and intended by the wiſe founders of the government, to be a protection to the lives and liberties of Engliſhmen, againſt the encroachments and perverſions of authority in the hands of fixed magiſtrates.

But this candid admiſſion on the part of Mr. Bearcroft, though very honourable to himſelf, is of no importance to me, ſince, from what has already fallen from your

lordſhip, I am not to expect a ratification of it from the court; it is therefore my duty to eſtabliſh it. I feel all the importance of my ſubject, and nothing ſhall lead me to-day to go out of it. I claim all the attention of the court, and the right to ſtate every authority which applies in my judgment to the argument, without being ſuppoſed to introduce them for other purpoſes than my duty to my client, and the conſtitution of my country warrants and approves.

It is not very uſual, in an Engliſh court of juſtice, to be driven back to the earlieſt hiſtory and original elements of the conſtitution, in order to eſtabliſh the firſt principles which mark and diſtinguiſh Engliſh law: they are always aſſumed, and, like axioms in ſcience, are made the foundations of reaſoning without being proved. Of this ſort our anceſtors, for many centuries, muſt have conceived the right of an Engliſh jury to decide upon every queſtion which the forms of the law ſubmitted to their final deciſion; ſince, though they have immemorially exerciſed that ſupreme juriſdiction, we find no trace in any of the ancient books of its ever being brought into queſtion.

It is but as yeſterday when compared with the age of the law itſelf, that judges, unwarranted by any former judgments of their predeceſſors, without any new commiſſion from the crown, or enlargement of judicial authority from the legiſlature, have ſought to faſten a limitation upon the rights and privileges of jurors, totally unknown in ancient times, and palpably deſtructive of the very end and object of their inſtitution.

No fact, my lord, is of more eaſy demonſtration; for the hiſtory and laws of a free country lie open even to vulgar inſpection.

During the whole Saxon æra, and even long after the eſtabliſhment of the Norman government, the whole adminiſtration of Juſtice, criminal and civil, was in the hands of the people themſelves, without the controul or intervention of any judicial authority, delegated to fixed magiſtrates by the crown. The tenants of every manor adminiſtered civil juſtice to one another in the court-baron of their lord; and their crimes were judged of in the leet,

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every ſuitor of the manor giving his voice as a juror, and the ſteward being only the regiſter, and not the judge.

On appeals from theſe domeſtic juriſdictions to the county-court, and to the torn of the ſheriff, or in ſuits and proſecutions originally commenced in either of them; the ſheriff's authority extended no further than to ſummon the jurors, to compel their attendance, miniſterially to regulate their proceedings, and to enforce their deciſions, and even where he was ſpecially empowered by the king's writ of *juſticies* to proceed in cauſes of ſuperior value; no *judicial* authority was thereby conferred upon himſelf, but only a more enlarged juriſdiction ON THE JURORS who were to try the cauſe mentioned in the writ.

It is true that the ſheriff cannot now intermeddle in pleas of the crown, but with this exception which brings no reſtrictions on juries, theſe juriſdictions remain untouched at this day; intricacies of property have introduced other forms of proceeding, but the conſtitution is the ſame.

This popular judicature was not confined to particular diſtricts, or to inferior ſuits and miſdemeanors, but pervaded the whole legal conſtitution; for, when the Conqueror, to encreaſe the influence of his crown, erected that great ſuperintending court of juſtice in his own palace, to receive appeals criminal and civil from every court in the kingdom, and placed at the head of it the *Capitalis juſticianus totius Angliæ*, of whoſe original authority the chief juſtice of this court is but a partial and feeble emanation: even that great magiſtrate was in the *aula regis* merely miniſterial; every one of the king's tenants who owed him ſervice in right of a barony, had a ſeat and a voice in that high tribunal; and the office of juſticiar was but to record and to enforce their judgments.

In the reign of King Edward the firſt, when this great office was aboliſhed, and the preſent courts at Weſtminſter eſtabliſhed by a diſtribution of its powers; the barons preſerved that ſupreme ſuperintending juriſdiction which never belonged to the juſticiar, but to themſelves only as the jurors in the king's court; a juriſdiction which,

which, when nobility from being territorial and feodal became perſonal and honorary, was aſſumed and exerciſed by the peers of England, who, without any delegation of judicial authority from the crown, form to this day the ſupreme and final court of Engliſh law, judging in the laſt reſort for the whole kingdom, and ſitting upon the lives of the peerage, in their ancient and genuine character, as the pares of one another.

When the courts at Weſtminſter were eſtabliſhed in their preſent forms, and when the civilization and commerce of the nation had introduced more intricate queſtions of juſtice, the judicial authority in civil caſes could not but enlarge its bounds; the rules of property in a cultivated ſtate of ſociety became by degrees beyond the compaſs of the unlettered multitude, and in certain well-known reſtrictions undoubtedly fell to the judges; yet more perhaps from neceſſity than by conſent, as all judicial proceedings were artfully held in the Norman language, to which the people were ſtrangers.

Of theſe changes in judicature; immemorial cuſtom, and the acquieſcence of the legiſlature, is the evidence which eſtabliſh the juriſdiction of the courts on the true principles of Engliſh law, and meaſure the extent of it by their ancient practice.

But no ſuch evidence is to be found of any the leaſt relinquiſhment or abridgment of popular judicature *in caſes of crimes*; on the contrary, every page of our hiſtory is filled with the ſtruggles of our anceſtors for its preſervation.

The law of property changes with new objects, and becomes intricate as it extends its dominion; but crimes muſt ever be of the ſame eaſy inveſtigation: they conſiſt wholly in intention, and the more they are multiplied by the policy of thoſe who govern, the more abſolutely the public freedom depends upon the people's preſerving the entire adminiſtration of criminal juſtice to themſelves.

In a queſtion of property between two private individuals, the crown can have no poſſible intereſt in preferring the one to the other: but it may have an intereſt in cruſhing both of them together in defiance of every principle

principle of humanity and juſtice, if they ſhould put themſelves forward in a contention for public liberty againſt a government ſeeking to emancipate itſelf from the dominion of the laws. No man in the leaſt acquainted with the hiſtory of nations, or of his own country, can refuſe to acknowledge, that if the adminiſtration of criminal juſtice were left in the hands of the crown, or its deputies, no greater freedom could poſſibly exiſt than government might chuſe to tolerate from the convenience or policy of the day.

My lord, this important truth is no diſcovery or aſſertion of mine, but is to be found in every book of the law: whether we go up to the moſt ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the moſt emphatical language. Mr. Juſtice Blackſtone by no means biaſſed towards democratical government, having, in the third volume of his Commentaries, explained the excellence of the trial by jury in civil caſes, expreſſes himſelf thus: vol. 4. p. 349. "But it holds much ſtronger in criminal caſes; ſince in "times of difficulty and danger, more is to be appre- "hended from the violence and partiality of judges ap- "pointed by the crown, in ſuits between the king and "the ſubject, than in diſputes between one individual "and another, to ſettle the boundaries of private pro- "perty. Our law has, therefore, wiſely placed this "ſtrong and twofold barrier of a preſentment and trial "by jury, between the liberties of the people and the "prerogative of the crown: without this barrier, juſtices "of *oyer* and *terminer* named by the crown, might, as in "France or in Turkey, impriſon, diſpatch, or exile, "any man that was obnoxious to government, by an "inſtant declaration that ſuch was their will and plea- "ſure. So that the liberties of England cannot but ſub- "ſiſt ſo long as this palladium remains ſacred and in- "violate, not only from all open attacks which none "will be ſo hardy as to make, but alſo from all ſecret "machinations which may ſap and undermine it."

But this remark, though it derives new force in being adopted by ſo great an authority, was no more original in Mr. Juſtice Blackſtone than in me, for the ſame expreſs reaſon:

reaſon: for the inſtitution and authority of juries is to be found in Bracton, who wrote above five hundred years before him. "The curia and the pares," ſays he, "were neceſſarily the judges in all caſes of life, limb, "crime and diſheriſon of the heir in capite. The king "could not decide, for then he would have been both "proſecutor and judge; neither could his juſtices, for "they repreſent him *."

Notwithſtanding all this, the learned judge was pleaſed to ſay at the trial, that there was no difference between criminal and civil caſes. I ſay, on the contrary, independent of theſe authorities that there is not, even to vulgar obſervation, the remoteſt ſimilitude between them.

There are four capital diſtinctions between proſecutions for crimes, and civil actions, every one of which deſerves conſideration.

Firſt, In the juriſdiction neceſſary to found the charge.

Secondly, In the manner of the defendant's pleading to it

Thirdly, In the authority of the verdict which diſcharges him.

Fourthly, In the independence and ſecurity of the jury from all conſequences in giving it.

As to the firſt, it is unneceſſary to remind your lordſhips, that, in a civil caſe, the party who conceives himſelf aggrieved, ſtates his complaint to the court, avails himſelf at his own pleaſure of its proceſs, compels an anſwer from the defendant by its authority, or taking the charge *pro confeſſo* againſt him on his default, is intitled to final judgment and execution for his debt, without any interpoſition of a jury. But in criminal caſes it is otherwiſe; the court has no cognizance of them, without leave from the people forming a grand inqueſt. If a man were to commit a capital offence in the face of all the judges of England; their united authority could not put him upon his trial: they could file no complaint againſt him, even upon the records of the ſupreme criminal court; but

* Vide likewiſe Mr. Reeves' very ingenious Hiſtory of the Engliſh law.

but could only commit him for ſafe cuſtody, which is equally competent to every common juſtice of the peace: the grand jury alone could arraign him, and in their diſcretion might likewiſe finally diſcharge him, by throwing out the bill, with the names of all your lordſhips as witneſſes on the back of it.

If it ſhall be ſaid, that this excluſive power of the grand jury does not extend to leſſer miſdemeanors, which may be proſecuted by information; I anſwer, that for that very reaſon it becomes doubly neceſſary to preſerve the power of the other jury which is left.

But, in the rules of pleading, there is no diſtinction between capital and leſſer offences; and, I venture to aſſert, that the defendant's plea of not guilty, which univerſally prevails as the legal anſwer to every information or indictment, as oppoſed to ſpecial pleas to the court in civil actions; and the neceſſity impoſed upon the crown to join the general iſſue, is abſolutely deciſive of the preſent queſtion.

Every lawyer muſt admit, that the rules of pleading were originally eſtabliſhed to mark and to preſerve the diſtinct juriſdictions of the court and the jury, by a ſeparation of the law from the fact wherever they were intended to be ſeparated. A perſon charged with owing a debt, or having committed a treſpaſs, &c. &c. if he could not deny the facts on which the actions were founded, was obliged to ſubmit his juſtification for matter of law by a ſpecial plea to the court upon the record; to which plea the plaintiff might demur, and ſubmit the legal merits to the judges. By this arrangement, no power was ever given to the jury, by an iſſue joined before them, but when a right of deciſion as comprehenſive as the iſſue went along with it: for, if a defendant in ſuch civil actions pleaded the general iſſue inſtead of a ſpecial plea, aiming at a general deliverance from the charge, by ſhewing his juſtification to the jury at the trial; the court protected its own juriſdiction, by refuſing all evidence of the facts on which ſuch juſtification was founded.

The extenſion of the general iſſue beyond its ancient limits, and in deviation from its true principle, has introduced

troduced ſome confuſion into this ſimple and harmonious ſyſtem; but the law is ſubſtantially the ſame.

No man, at this day, in any of thoſe actions where the ancient forms of our juriſprudence are ſtill wiſely preſerved, can poſſibly get at the opinion of a jury upon any queſtion not intended by the conſtitution for their deciſion. In actions of debt, detinue, breach of covenant, treſpaſs, or replevin, the defendant can only ſubmit the mere fact to the jury; the law muſt be pleaded to the court: if, dreading the opinion of the judges, he conceals his juſtification under the cover of a general plea in hopes of a more favourable conſtruction of his defence at the trial; its very exiſtence can never even come within the knowledge of the jurors; every legal defence muſt ariſe out of facts, and the authority of the judge is interpoſed, to prevent their appearing before a tribunal which, in ſuch caſes, has no competent juriſdiction over them.

By impoſing this neceſſity of pleading every legal juſtification to the court, and by this excluſion of all evidence on the trial beyond the negation of the fact, the courts indiſputably intended to eſtabliſh, and did in fact effectually ſecure the judicial authority over legal queſtions from all encroachment or violation; and it is impoſſible to find a reaſon in law, or in common-ſenſe, why the ſame boundaries between the fact and the law ſhould not have been at the ſame time extended to criminal caſes by the ſame rules of pleading, if the juriſdiction of the jury had been deſigned to be limited to the fact as in civil actions.

But no ſuch boundary was ever made or attempted; on the contrary, every perſon charged with any crime by an indictment or information, has been in all times from the Norman conqueſt to this hour, not only permitted, but even bound to throw himſelf upon his country for deliverance, by the general plea of not guilty; and may ſubmit his whole defence to the jury, whether it be a negation of the fact, or a juſtification of it in law: and the judge has no authority as in a civil caſe, to refuſe ſuch evidence at the trial, as out of the iſſue, and as *coram non judice*, an authority which in common ſenſe he certainly would

would have, if the jury had no higher juriſdiction in the one caſe than in the other. The general plea thus ſanctioned by immemorial cuſtom, ſo blends the law and the fact together, as to be inſeparable but by the voluntary act of the jury in finding a ſpecial verdict: the general inveſtigation of the whole charge is therefore before them, and although the defendant admits the fact laid in the information or indictment, he, nevertheleſs, under his general plea, gives evidence of others which are collateral, referring them to the judgment of the jury, as a legal excuſe or juſtification, and receives from their verdict a complete, general, and concluſive deliverance.

Mr. Juſtice Blackſtone, in the fourth volume of his commentaries, page 339, ſays, "The traiterous or felonious intent are the points and very giſt of the indictment, and muſt be anſwered directly by the general negative, not guilty, and the jury will take notice of any defenſive matter, and give their verdict accordingly as effectually as if it were ſpecially pleaded."

This, therefore, ſays Sir Matthew Hale, in his pleas of the crown, page 258, is, upon all accounts, the moſt advantageous plea for the defendant: "It would be a moſt unhappy caſe for the judge himſelf if the priſoner's fate depended upon his directions; unhappy alſo for the priſoner: for if the judge's opinion muſt rule the verdict, the trial by jury would be uſeleſs."

My Lord, the concluſive operation of the verdict when given, and the ſecurity of the jury from all conſequences in giving it, renders the contraſt between criminal and civil caſes ſtriking and compleat. No new trial can be granted as in a civil action: your Lordſhips, however you may diſapprove of the acquittal, have no authority to award one; for there is no precedent of any ſuch upon record, and the diſcretion of the court is circumſcribed by the law.

Neither can the jurors be attainted by the crown. In Buſhel's caſe, Vaughan's reports, page 146, that learned and excellent judge expreſſed himſelf thus: "There is no caſe in all the law of an attaint for the King, nor

"any

" any opinion but that of Thyrning's, 10th of Henry " IVth, title Attaint, 60 and 64, for which there is no " warrant in law, though there be other ſpecious autho- " rity againſt it, touched by none that have argued this " caſe."

Lord Mansfield. To be ſure it is ſo.

Mr. Erſkine. Since that is clear, my Lord, I ſhall not trouble the court farther upon it: indeed I have not been able to find any one authority for ſuch an attaint but a dictum in Fitzherbert's Natura Brevium, page 107; and on the other hand, the doctrine of Buſhel's caſe is expreſsly agreed to in very modern times, vide Lord Raymond's Reports, 1ſt volume, page 469.

If then your Lordſhips reflect but for a moment upon this comparative view of criminal and civil caſes which I have laid before you; how can it be ſeriouſly contended, not merely that there is no difference, but that there is any the remoteſt ſimilarity between them. In the one caſe, the power of accuſation begins from the court; in the other, from the people only, forming a grand jury. In the one, the defendant muſt plead a ſpecial juſtification, the merits of which can only be decided by the judges; in the other, he may throw himſelf for general deliverance upon his country. In the firſt the court may award a new trial if the verdict for the defendant be contrary to the evidence or the law; in the laſt, it is concluſive and unalterable; and to crown the whole, the King never had that proceſs of attaint which belonged to the meaneſt of his ſubjects.

When theſe things are attentively conſidered, I might aſk thoſe who are ſtill diſpoſed to deny the right of the jury to inveſtigate the whole charge, whether ſuch a ſoleciſm can be conceived to exiſt in any human government; much leſs in the moſt refined and exalted in the world; as that a power of ſupreme judicature ſhould be conferred at random by the blind forms of the law where no right was intended to paſs with it, and which was upon no occaſion and under no circumſtance to be exerciſed; which, though exerted notwithſtanding in every age and in a thouſand inſtances, to the confuſion and diſcomfiture

comfiture of fixed magiſtracy, ſhould never be checked by authority, but ſhould continue on from century to century, the revered guardian of liberty and of life, arreſting the arm of the moſt headſtrong government in the worſt of times, without any power in the crown or its judges, to touch without its conſent the meaneſt wretch in the kingdom, or even to aſk the reaſon and principle of the verdict which acquits him. That ſuch a ſyſtem ſhould prevail in a country like England, without either the original inſtitution or the acquieſcing ſanction of the legiſlature is impoſſible. Believe me, my Lord, no talents can reconcile, no authority can ſanction ſuch an abſurdity; the common ſenſe of the world revolts at it.

Having eſtabliſhed this important right in the jury beyond all poſſibility of cavil or controverſy, I will now ſhew your Lordſhip that its exiſtence is not merely conſiſtent with theory, but is illuſtrated and confirmed by the univerſal practice of all judges; not even excepting Mr. Juſtice Forſter himſelf, whoſe writings have been cited in ſupport of the contrary opinion. How a man expreſſes his abſtract ideas is but of little importance when an appeal can be made to his plain directions to others, and to his own particular conduct: but even none of his expreſſions when properly conſidered and underſtood militate againſt my poſition.

In this juſtly celebrated book on the criminal law, page 256, he expreſſes himſelf thus: "The conſtruction "which the law putteth upon fact STATED AND "AGREED OR FOUND by a jury, *is in all caſes undoubt-* "*edly the proper province of the court.*"

Now if the adverſary is diſpoſed to ſtop here, though the author never intended he ſhould, as is evident from the reſt of the ſentence, yet I am willing to ſtop with him, and to take it as a ſubſtantive propoſition; for the ſlighteſt attention muſt diſcover that it is not repugnant to any thing which I have ſaid. Facts *ſtated and agreed*, or facts *found* by a jury which amounts to the ſame thing, conſtitute a ſpecial verdict; and who ever ſuppoſed that the law upon a ſpecial verdict was not the province of the

joined, the authority of the court only commences when the jury chuſes to decline the deciſion of the law by a general verdict; the right of declining which legal determination, is by-the-bye a privilege conferred on them by the ſtatute of Weſtminſter, 2d, and by no means a reſtriction of their powers.

But another very important view of the ſubject remains behind; for ſuppoſing I had failed in eſtabliſhing that contraſt between criminal and civil caſes, which is now too clear not only to require, but even to juſtify another obſervation, the argument would loſe nothing by the failure; the ſimilarity between criminal and civil caſes derives all its application to the argument from the learned judge's ſuppoſition, that the juriſdiction of the jury over the law was never contended for in the latter, and conſequently on a principle of equality could not be ſupported in the former; whereas, I do contend for it, and can inconteſtibly eſtabliſh it in both. This application of the argument is plain from the words of the charge: "If the jury could find the law, it would undoubtedly "hold in civil caſes as well as criminal: but was it ever "ſuppoſed that a jury was competent to ſay the opera- "tion of a fine, or a recovery, or a warranty, which are "mere queſtions of law."

To this queſtion I anſwer, that the competency of the jury in ſuch caſes is contended for to the full extent of my principle, both by Lyttleton and by Coke: they cannot indeed decide upon them, *de plano*, which, as Vaughan truly ſays, is unintelligible, becauſe an unmixed queſtion of law can by no poſſibility come before them for deciſion; but whenever (which very often happens) the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England comes forward, mixed with the fact on the general iſſue, the jury have then moſt uequeſtionably a right to determine it; and what is more, no other authority poſſibly can; becauſe when the general iſſue is permitted by law, theſe queſtions cannot appear on the record for the judgment of the court, and although it can grant a new trial, yet the ſame queſtion muſt ultimately be determined by another jury. This is not only ſelf-evident to every lawyer,

lawyer, but, as I ſaid, is expreſsly laid down by Littleton in the 368th ſection. "Alſo in ſuch caſe where the "inqueſt may give their verdict at large, if they will "take upon them the knowledge of the law upon the "matter, they may give their verdict generally as it is "put in their charge: as in the caſe aforeſaid they may "well ſay, that the leſſor did not diſſeiſe the leſſee if "they will." Coke, in his commentary on this ſection, confirms Littleton, ſaying, That in doubtful caſes they ſhould find ſpecially for fear of an attaint; and it is plain that the ſtatute of Weſtminſter the 2d, was made either to give or to confirm the right of the jury to find the matter ſpecially if they would, leaving their juriſdiction over the law as it ſtood by the common law. The words of the Statute of Weſtminſter 2d, chapter 30th, are, "Ordinatum eſt quod juſticiarii ad aſſizas capiendias aſ-"ſignati, non compellant juratores dicere preciſe ſi ſit "deſſina vel non; dummodo dicere voluerint veritatem "facti et petere auxilium curiæ."

From theſe words it ſhould appear, that the juriſdiction of the jury over the law when it came before them on the general iſſue, was ſo veſted in them by the conſtitution, that the exerciſe of it in all caſes had been conſidered to be compulſory upon them, and that this act was a legiſlative relief from that compulſion in the caſe of an aſſize of diſſeizin: it is equally plain from the remaining words of the act, that their juriſdiction remained as before; "ſed ſi ſponte velent diciere quod diſſeiſina eſt vel non, "admittatur eorum veredictum ſub ſuo periculo."

But the moſt material obſervation upon this ſtatute as applicable to the preſent ſubject is, That the terror of the attaint from which it was paſſed to relieve them, having (as has been ſhewn) no exiſtence in caſes of crime, the act only extended to relieve the jury at their diſcretion from finding the law in civil actions; and conſequently it is only from cuſtom, and not from poſitive law, that they are not *even compellible* to give a general verdict involving a judgment of law on every criminal trial.

Theſe principles and authorities certainly eſtabliſh that it is the duty of the judge on every trial where the gene-

ral iſſue is pleaded, to give to the jury his opinion on the law as applied to the caſe before them; and that they muſt find a general verdict comprehending a judgment of law, unleſs they chuſe to refer it ſpecially to the court.

But we are here, in a caſe where it is contended, that the duty of the judge is the direct contrary of this: that he is to give no opinion at all to the jury upon the law as applied to the caſe before them; that they likewiſe are to refrain from all conſideration of it, and yet that the very ſame general verdict comprehending both fact and law, is to be given by them as if the whole legal matter had been ſummed up by the one and found by the other.

I confeſs I have no organs to comprehend the principle on which ſuch a practice proceeds. I contended for nothing more at the trial than the very practice recommended by Forſter and Lord Raymond: I addreſſed myſelf to the jury upon the law with all poſſible reſpect and deference, and indeed with very marked perſonal attention to the learned judge: ſo far from urging the jury dogmatically to think for themſelves without his conſtitutional aſſiſtance, I called for his opinion on the queſtion of libel, ſaying, That if he ſhould tell them diſtinctly the paper indicted was libellous, though I ſhould not admit that they were bound at all events to give effect to it if they felt it to be innocent; yet I was ready to agree that they ought not to go againſt the charge without great conſideration: but that if he ſhould ſhut himſelf up in ſilence, giving no opinion at all upon the criminality of the paper from which alone any guilt could be faſtened on the publiſher, and ſhould narrow their conſideration to the publication, I entered my proteſt againſt their finding a verdict affixing the epithet of *guilty* to the mere fact of publiſhing a paper, the guilt of which they had not inveſtigated.

If, after this addreſs to the jury, the learned judge had told them, that in his opinion the paper was a libel, but ſtill leaving it to their judgments, and leaving likewiſe the defendant's evidence to their conſideration, had further told them, that he thought it did not exculpate the publication; and if, in conſequence of ſuch directions, the jury had

had found a verdict for the crown, I ſhould never have made my preſent motion for a new trial: becauſe I ſhould have conſidered ſuch a verdict of guilty as founded upon the opinion of the jury on the whole matter as left to their conſideration, and muſt have ſought my remedy by arreſt of judgment on the record.

But the learned judge took a direct contrary courſe: he gave no opinion at all on the guilt or innocence of the paper; he took no notice of the defendant's evidence of intention; told the jury, in the moſt explicit terms, that neither the one nor the other were within their juriſdiction; and upon the mere fact of publication directed a general verdict comprehending the epithet of guilty, after having expreſsly withdrawn from the jury every conſideration of the merits of the paper publiſhed, or the intention of the publiſher, from which it is admitted on all hands the guilt of publication could alone have any exiſtence.

My motion is therefore founded upon this obvious and ſimple principle; that the defendant has had in fact no trial; having been found guilty without any inveſtigation of his guilt, and without any power left to the jury to take cognizance of his innocence. I undertake to ſhew, that the jury could not poſſibly conceive or believe from the judge's charge, that they had any juriſdiction to acquit him, however they might have been impreſſed even with the merit of the publication, or convinced of his meritorious intention in publiſhing it: nay, what is worſe, while the learned judge totally deprived them of their whole juriſdiction over the queſtion of libel and the defendant's ſeditious intention, he at the ſame time directed a general verdict of guilty, which comprehended a judgment upon both.

When I put this conſtruction on the learned judge's direction, I found myſelf wholly on the language in which it was communicated; and it will be no anſwer to ſuch conſtruction, that no ſuch reſtraint was meant to be conveyed by it. If the learned judge's intentions were even the direct contrary of his expreſſions, yet if in conſequence of that which was expreſſed though not intended, the jury were abridged of a juriſdiction which belonged to them by law,

and in the exerciſe of which the defendant had an intereſt, he is equally a ſufferer, and the verdict given under ſuch miſconception of authority is equally void: my application ought therefore to ſtand or fall by the charge itſelf, upon which I diſclaim all diſingenuous cavilling. I am certainly bound to ſhew, that from the general reſult of it fairly and liberally interpreted, the jury could not conceive that they had any right to extend their conſideration beyond the bare fact of publication, ſo as to acquit the defendant by a judgment founded on the legality of the dialogue, or the honeſty of the intention in publiſhing it.

In order to underſtand the learned judge's direction, it muſt be recollected that it was addreſſed to them in anſwer to me, who had contended for nothing more than that theſe two conſiderations ought to rule the verdict; and it will be ſeen, that the charge, on the contrary, not only excluded both of them by general inference, but by expreſſions, arguments, and illuſtrations the moſt ſtudiouſly ſelected to convey that excluſion, and to render it binding on the conſciences of the jury.

After telling them in the very beginning of his charge, that the ſingle queſtion for their deciſion was, Whether the defendant had publiſhed the pamphlet? he declared to them, that it was not even *allowed* to him as the judge trying the cauſe, to ſay whether it was or was not a libel: for that if he ſhould ſay it was no libel, and they following his direction ſhould acquit the defendant; they would thereby deprive the proſecutor of his writ of error upon the record, which was one of his deareſt birthrights. The law, he ſaid, was equal between the proſecutor and the defendant; that a verdict of acquittal would cloſe the matter for ever, depriving him of his appeal; and that whatever therefore was upon the record *was not for their deciſion*, but might be carried at the pleaſure of either party to the houſe of lords.

Surely language could not convey a limitation upon the right of the jury over the queſtion of libel, or the intention of the publiſher, more poſitive or more univerſal. It was poſitive inaſmuch as it held out to them that ſuch a juriſdiction could not be entertained without injuſtice; and

and it was univerſal becauſe the principle had no ſpecial application to the particular circumſtances of that trial; but ſubjected every defendant upon every proſecution for a libel, to an inevitable conviction on the mere proof of publiſhing *any thing*, though both judge and jury might be convinced that the thing publiſhed was innocent and even meritorious.

My lord, I make this commentary without the hazard of contradiction from any man whoſe reaſon is not diſordered. For, if the proſecutor in every caſe, has a birthright by law to have the queſtion of libel left open upon the record, which it can only be by a verdict of conviction on the ſingle fact of publiſhing: no legal right can at the ſame time exiſt in the jury to ſhut out that queſtion by a verdict of acquittal founded upon the merits of the publication, or the innocent mind of the publiſher.

Rights that are repugnant and contradictory cannot be co-exiſtent. The jury can never have a conſtitutional right to do an act beneficial to the defendant, which when done deprives the proſecutor of a right which the ſame conſtitution has veſted in him. No right can belong to one perſon, the exerciſe of which in every inſtance muſt neceſſarily work a wrong to another. If the proſecutor of a libel has in every inſtance the privilege to try the merits of his proſecution before the judges, the jury can have no right in any inſtance to preclude his appeal to them by a general verdict for the defendant.

The jury therefore from this part of the charge muſt neceſſarily have felt themſelves abſolutely limited (I might ſay even in their powers) to the fact of publication; becauſe the higheſt reſtraint upon good men is to convince them that they cannot break looſe from it without injuſtice: and the power of a good citizen is never more effectually deſtroyed than when he is made to believe that the exerciſe of it will be a breach of his duty to the public, and a violation of the laws of his country.

But ſince equal juſtice between the proſecutor and the defendant is the pretence for this abridgement of juriſdiction, let us examine a little how it is effected by it.

Do

Do the profecutor and the defendant really ſtand upon an equal footing by this mode of proceeding? with what decency this can be alledged, I leave thoſe to anſwer who know that it is only by the indulgence of Mr. Bearcroft, of counſel for the proſecution, that my reverend client is not at this moment in priſon *, while we are diſcuſſing this notable equality.

Beſides, my Lord, the judgment of this court, though not final in the conſtitution, and therefore not binding on the proſecutor, is abſolutely concluſive on the defendant. If your Lordſhips pronounce the record to contain no libel, and arreſt the judgment on the verdict, the proſecutor may carry it to the Houſe of Lords; and pending his writ of error remains untouched by your Lordſhip's deciſion. But, if judgment be againſt the defendant, it is only at the diſcretion of the crown (as it is ſaid) and not of right, that he can proſecute any writ of error at all; and even if he finds no obſtruction in that quarter, it is but at the beſt an appeal for the benefit of public liberty, from which he himſelf can have no perſonal benefit; for the writ of error being no ſuperſedeas, the puniſhment is inflicted on him in the mean time.

In the caſe of Mr. Horne, this court impriſoned him for publiſhing a libel upon its own judgment, pending his appeal ſtom its juſtice; and he had ſuffered the utmoſt rigour which the law impoſed upon him as a criminal, at the time that the Houſe of Lords, with the aſſiſtance of the twelve Judges of England, were gravely aſſembled to determine, whether he had been guilty of any crime. I do not mention this caſe as hard or rigorous on Mr. Horne, as an individual: it is the general courſe of practice, but ſurely that practice ought to put an end to this argument of equality between proſecutor and priſoner.

It

* Lord Mansfield ordered the Dean to be committed on the motion for the new trial, and ſaid, he had no diſcretion to ſuffer him to be at large, without conſent, after his appearance in court, on conviction. Upon which, Mr. Bearcroft gave his conſent that the Dean ſhould remain at large upon bail.

It is adding inſult to injury, to tell an innocent man who is in a dungeon pending his writ of error, and of whoſe innocence, both judge and jury were convinced at the trial; that he is in equal ſcales with his proſecutor, who is at large, becauſe he has an opportunity of deciding after the expiration of his puniſhment, that the proſecution had been unfounded, and his ſufferings unjuſt.

By parity of reaſoning, a priſoner in a capital caſe is to be hanged in the mean time for the benefit of equal juſtice; leaving his executors to fight the battle out with his proſecutor upon the record, through every court in the kingdom: by which at laſt his attainder muſt be reverſed, and the blood of his poſterity remain uncorrupted. What juſtice can be more impartial or equal!

So much for this right of the proſecutor of a libel to *compel* a jury in every caſe, generally to convict a defendant on the fact of publication, or to find a ſpecial verdict. A right unheard of before ſince the birth of the conſtitution; not even founded upon any equality in fact, even if ſuch a ſhocking parity could exiſt in law, and not even contended to exiſt in any other caſe where private men become the proſecutors of crimes for the ends of public juſtice.

It can have, generally ſpeaking, no exiſtence in any proſecution for felony; becauſe the general deſcription of the crime in ſuch indictments, for the moſt part, ſhuts out the legal queſtion in the particular inſtance, from appearing on the record: and for the ſame reaſon, it can have no place even in appeals of death, &c. the only caſes where proſecutors appear as the avengers of their own private wrongs, and not as the repreſentatives of the crown.

The learned judge proceeded next to eſtabliſh the ſame univerſal limitation upon the power of the jury, from the hiſtory of different trials, and the practice of former judges who preſided at them. And while I am complaining of what I conceive to be injuſtice, I muſt take care not to be unjuſt myſelf. I certainly do not, nor ever did conſider the learned judge's miſdirection in his charge to be peculiar to himſelf: it was only the reſiſtance of the defendant's evidence, and what paſſed after the

the jury returned into court with the verdict, that I ever conſidered to be a departure from all precedents: the reſt had undoubtedly the ſanction of ſeveral modern caſes; and I wiſh, therefore, to be diſtinctly underſtood, that I partly found my motion for a new trial in oppoſition to theſe deciſions. It is my duty to ſpeak with deference of all the judgments of this court; and I feel an additional reſpect for ſome of thoſe I am about to combat, becauſe they are your Lordſhip's: but comparing them with the judgments of your predeceſſors for ages, which is the higheſt evidence of Engliſh law, I muſt be forgiven if I preſume to queſtion their authority.

My Lord, it is neceſſary that I ſhould take notice of ſome of them as they occur in the learned judge's charge; for although he is not reſponſible for the rectitude of thoſe precedents which he only cited in ſupport of it, yet the defendant is unqueſtionably entitled to a new trial, if their principles are not ratified by the court; for whenever the learned judge cited precedents to warrant the limitation on the province of the jury impoſed by his own authority, it was ſuch an adoption of the doctrines they contained, as made them a rule to the jury in their deciſion.

Firſt then, the learned judge, to overturn my argument with the jury for their juriſdiction over the whole charge, oppoſed your Lordſhip's eſtabliſhed practice for eight and twenty years; and the weight of this great authority was encreaſed by the general manner in which it was ſtated; for I find no expreſſions of your Lordſhip's in any of the reported caſes which go the length contended for. I find the practice, indeed, fully warranted by them; but I do not meet with the principle which can alone vindicate that practice, fairly and diſtinctly avowed. The learned judge, therefore, referred to the charge of chief juſtice Raymond, in the caſe of the King and Franklin, in which the univerſal limitation contended for, is indeed laid down, not only in the moſt unequivocal expreſſions, but the ancient juriſdiction of juries, reſting upon all the authorities I have cited, treated as a ridiculous notion which had been juſt taken up a little before the year 1731; and which no man living had

had ever dreamt of before. The learned judge obſerved, that lord Raymond ſtated to the jury on Franklin's trial, that there were three queſtions: the firſt was, the fact of publiſhing the Craftſman. Secondly, whether the averments in the information were true: but that the third, viz. whether it was a libel, was merely a queſtion of law with which the jury *had nothing to do*, as had been then of late thought by ſome people who ought to have known better.

This direction of Lord Raymond's was fully ratified and adopted in all its extent, and given to the jury, on the preſent trial, with ſeveral others of the ſame import, as an unerring guide for their conduct; and ſurely human ingenuity could not frame a more abſtract and univerſal limitation upon their right to acquit the defendant by a general verdict; for Lord Raymond's expreſſions amount to an abſolute denial of the right of the jury, to find the defendant not guilty, if the publication and innuendos are proved. "Libel or no libel, is a queſ-" tion of law with which you, the jury, *have nothing to* " *do.*" How then can they have any right to give a general verdict conſiſtently with this declaration? can any man in his ſenſes collect that he has a right to decide on that with which he has nothing to do?

But it is needleſs to comment on theſe expreſſions, for the jury were likewiſe told by the learned judge himſelf, that if they believed the fact of publication, they were *bound* to find the defendant guilty; and it will hardly be contended, that a man has a right to refrain from doing that which he is bound to do.

Mr. Cowper, as counſel for the proſecution, took upon him to explain what was meant by this expreſſion; and I ſeek for no other conſtruction: "The learned judge " (ſaid he) did not mean to deny the right of the jury, " but only to convey, that there was a religious and " moral obligation upon them to refrain from the exerciſe " of it."

Now, if the principle which impoſed that obligation had been alledged to be ſpecial, applying only to the particular caſe of the Dean of St. Aſaph, and conſequently conſiſtent with the right of the jury, to a more enlarged

juriſdiction in other inſtances: telling the jury that they were bound to convict on proof of publication, might be plauſibly conſtrued into a recommendation to refrain from the exerciſe of their right in that caſe, and not to a general denial of its exiſtence: but the moment is recollected, that the principle which bound them was not particular to the inſtance; but abſtract, and univerſal, binding alike in every proſecution for a libel, it requires no logic to pronounce the expreſſion to be an abſolute, unequivocal, and univerſal denial of the right: common ſenſe tells every man, that to ſpeak of a perſon's right to do a thing which yet in every poſſible inſtance where it might be exerted, he is religiouſly and morally bound not to exert, is not even ſophiſtry, but downright vulgar nonſenſe.

But my Lord, the jury were not only limited by theſe modern precedents, which certainly have an exiſtence; but were in my mind limited with ſtill greater effect by the learned judge's declaration, that ſome of thoſe ancient authorities on which I had principally relied for the eſtabliſhment of their juriſdiction, had not merely been over-ruled, but were altogether inapplicable. I particularly obſerved how much ground I loſt with the jury, when they were told from the bench, that even in Buſhel's caſe, on which I had ſo greatly depended, the very reverſe of my doctrine had been expreſly eſtabliſhed: The court having ſaid unanimouſly in that caſe, according to the learned judge's ſtate of it, that if the jury be aſked what the law is, they cannot ſay, and having likewiſe ratified in expreſs terms the maxim, *Ad queſtionem legis non reſpondent juratores.*

My lord, this declaration from the bench, which I confeſs not a little ſtaggered and ſurprized me, rendered it my duty to look again into Vaughan, where Buſhel's caſe is reported; I have performed that duty, and now take upon me poſitively to ſay, that the words of Lord Chief Juſtice Vaughan, which the learned judge conſidered as a judgment of the court, denying the juriſdiction of the Jury over the law, *where a general iſſue is joined before them*, were on the contrary made uſe of by that learned and excellent

excellent perſon, to expoſe the fallacy of ſuch a miſapplication of the maxim alluded to, by the counſel againſt Buſhel; declaring that it had no reference to any caſe where the law and the fact were incorporated by the plea of not guilty, and confirming the right of the jury to find the law upon every ſuch iſſue, in terms the moſt emphatical and expreſſive. This is manifeſt from the whole report.

Buſhel, one of the jurors on the trial of Penn and Mead, had been committed by the court for finding the defendant not guilty, againſt the direction of the court in matter of law; and being brought before the court of common pleas by habeas corpus, this cauſe of commitment appeared upon the face of the return to the writ. It was contended by the counſel againſt Buſhel upon the authority of this maxim, that the commitment was legal, ſince it appeared by the return, that Buſhel had taken upon him to find the law againſt the direction of the judge, and had been therefore legally impriſoned for that contempt. It was upon that occaſion that Chief Juſtice Vaughan, with the concurrence of the whole court, repeated the maxim, *Ad queſtionem legis non reſpondent juratores*, as cited by the connſel for the crown, but denied the application of it to impoſe any reſtraint upon jurors trying any crime upon the general iſſue. His language is too remarkable to be forgotten, and too plain to be miſunderſtood. Taking the words of the return to the habeas corpus, viz. "That the jury did acquit againſt the di-
"rection of the court in matter of law." "Theſe
"words (ſaid this great lawyer) taken literally and *de*
"*plano* are inſignificant and unintelligible, for no iſſue
"can be joined of matter of law, no jury can be charged
"with the trial of matter of law barely: no evidence
"ever was, or can be given to a jury of what is law or
"not; nor any oath given to a jury to try matter of
"law alone, nor can any attaint lie for ſuch a falſe oath.
"Therefore we muſt take off this veil and colour of
"words, which make a ſhew of being ſomething, but
"are in fact nothing: for if the meaning of theſe words,
"*Finding againſt the direction of the court in matter of law*,
"be, that if the judge, having heard the evidence given

" in court, (for he knows no other,) ſhall tell the jury
" upon this evidence, that the law is for the plaintiff or
" the defendant, and they under the pain of fine and
" impriſonment are to find accordingly, every one ſees
" that the jury is but a troubleſome delay, great charge,
" and of no uſe in determining right and wrong; which
" were a ſtrange and new found concluſion, after a trial
" ſo celebrated for many hundreds of years in this
" country."

Lord Chief Juſtice Vaughan's argument is therefore plainly this. Adverting to the arguments of the counſel, he ſays, you talk of the maxim *Ad queſtionem legis non reſpondent juratores*, but it has no ſort of application to your ſubject. The words of your return, viz. That Buſhel did acquit againſt the direction of the court in matter of law, is unintelligible and as applied to the caſe impoſſible. The jury could not be aſked in the abſtract, what was the law: they could not have an iſſue of the law joined before them: they could not be ſworn to try it. *Ad queſtionem legis non reſpondent juratores:* therefore to ſay literally and *de plano* that the jury found the law againſt the judge's direction is abſurd: they could not be in a ſituation to find it; an unmixed queſtion of law could not be before them: the judge could not give any poſitive directions of law upon the trial, for the law can only ariſe out of facts, and the judge cannot know what the facts are till the jury have given their verdict. Therefore, continued the chief juſtice, let us take off this veil and colour of words, which make a ſhew of being ſomething but are in fact nothing: let us get rid of the fallacy of applying a maxim, which truly deſcribes the juriſdiction of the courts over iſſues of law, to deſtroy the juriſdiction of Jurors, in caſes where law and fact are blended together upon a trial. For if the jury at the trial are bound to receive the law from the judge, every one ſees that it is a mere mockery, and of no uſe in determining right and wrong.

This is the plain common ſenſe of the argument; and it is impoſſible to ſuggeſt a diſtinction between its application to Buſhel's caſe and to the preſent; except that the right of impriſoning the jurors was there contended for, in order to enforce obedience to the directions of the judge.

judge. But this diſtinction, if it deſerves the name, tho' held up by Mr. Bearcroft as very important, is a diſtinction without a difference. For if according to Vaughan the free agency of the jury over the whole charge, uncontrouled by the judge's direction, conſtitutes the whole of that antient mode of trial; it ſignifies nothing by what means that free agency is deſtroyed: whether by the impriſonment of conſcience or of body; by the operation of their virtues or of their fears: whether they decline exerting their juriſdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the court puniſhable by impriſonment; their juriſdiction is equally taken away.

My Lord, I ſhould be very ſorry improperly to waſte the time of the court, but I cannot help repeating once again, that if in conſequence of the learned judge's directions, the jury from a juſt deference to learning and authority, from a nice and modeſt ſenſe of duty, felt themſelves not at liberty to deliver the defendant from the whole indictment; he has not been tried. Becauſe though he was entitled by law to plead generally that he was not guilty; though he did in fact plead it accordingly and went down to trial upon it, yet the jury have not been permitted to try that iſſue, but have been directed to find at all events a general verdict of guilty; with a poſitive injunction not to inveſtigate the guilt, or even to liſten to any evidence of innocence.

My lord, I cannot help contraſting this trial, with that of Colonel Gordon's but a few ſeſſions paſt in London. I had in my hand but this moment, an accurate note of Mr. Baron Eyre's charge to the jury on that occaſion; I will not detain the court by looking for it amongſt my papers; becauſe I believe I can correctly repeat the ſubſtance of it.

Earl of Mansfield. The caſe of the King againſt Coſmo Gordon.

Mr. Erſkine. Yes, my lord: Colonel Gordon was indicted for the murder of General Thomas, whom he had killed in a duel: and the queſtion was, whether if the jury were ſatisfied of that fact, the priſoner was to be convicted of murder?

That

That was according to Forſter as much a queſtion of law, as libel or no libel: but Mr. Baron Eyre did not therefore feel himſelf at liberty to withdraw it from the jury. After ſtating (greatly to his honour) the hard condition of the priſoner, who was brought to a trial for life, in a caſe where the poſitive law and the prevailing manners of the times were ſo ſtrongly in oppoſition to one another, that he was afraid the puniſhment of individuals would never be able to beat down an offence ſo ſanctioned; he addreſſed the jury nearly in theſe words: "Nevertheleſs, gentlemen, I am bound to declare to "you, what the law is as applied to this caſe, in all the "different views in which it can be conſidered by you "upon the evidence. *Of this law and of the facts as you "ſhall find them, your verdict muſt be compounded*, and I "perſuade myſelf, that it will be ſuch a one as to give "ſatisfaction to your own conſciences."

Now, if Mr. Baron Eyre, inſtead of telling the jury that a duel, however fairly and honourably fought, was a murder by the law of England, and leaving them to find a general verdict under that direction, had ſaid to them, that whether ſuch a duel was murder or manſlaughter, was a queſtion with which neither he nor they had any thing to do, and on which he ſhould therefore deliver no opinion; and had directed them to find that the priſoner was guilty of killing the deceaſed in a deliberate duel, telling them, that the court would ſettle the reſt; that would have been directly conſonant to the caſe of the Dean of St. Aſaph. By this direction, the priſoner would have been in the hands of the court, and the judges, not the jury, would have decided upon the life of Colonel Gordon.

But the two learned judges differ moſt eſſentially indeed.

Mr. Baron Eyre conceives himſelf bound in duty to ſtate the law as applied to the particular facts, and to leave it to the jury.

Mr. Juſtice Buller ſays, he is not bound nor even allowed ſo to ſtate or apply it, and withdraws it entirely from their conſideration.

Mr.

Mr. Baron Eyre tells the jury that their verdict is to be compounded of the fact and the law.

Mr. Juſtice Buller on the contrary, that it is to be confined to the fact only, the law being the excluſive province of the court.

My lord, it is not for me to ſettle differences of opinion between the judges of England, nor to pronounce which of them is wrong: but, ſince they are contradictory and inconſiſtent, I may hazard the aſſertion that they cannot both be right: the authorities which I have cited, and the general ſenſe of mankind which ſettles every thing elſe, muſt determine the reſt.

My lord, I come now to a very important part of the caſe, untouched I believe before in any of the arguments on this occaſion.

I mean to contend, that the learned judge's charge to the jury cannot be ſupported even upon its own principles; for, ſuppoſing the court to be of opinion that all I have ſaid in oppoſition to theſe principles is inconcluſive, and that the queſtion of libel, and the intention of the publiſher were properly withdrawn from the conſideration of the jury, ſtill I think I can make it appear that ſuch a judgment would only render the miſdirection more palpable and ſtriking.

I may ſafely aſſume, that the learned judge muſt have meant to direct the jury either to find a general or a ſpecial verdict; or to ſpeak more generally, that one of thoſe two verdicts muſt be the object of every charge: For I venture to affirm, that neither the records of the courts, the reports of their proceedings, nor the writings of lawyers, furniſh any account of a third. There can be no middle verdict between both; the jury muſt either try the whole iſſue generally, or find the facts ſpecially, referring the legal concluſion to the court.

I may affirm with equal certainty, that the general verdict, *ex vi termini*, is univerſally as comprehenſive as the iſſue, and that conſequently ſuch a verdict on an indictment, upon the general iſſue, not guilty, univerſally and unavoidably involves a judgment of law, as well as fact; becauſe the charge comprehends both, and the verdict, as has been ſaid, is coextenſive with it. Both

Coke

Coke and Littleton, give this preciſe definition of a general verdict; for they both ſay, that if the jury will find the law, they may do it by a general verdict, which is ever as large as the iſſue. If this be ſo, it follows by neceſſary conſequence, that if the judge means to direct the jury to find generally againſt a defendant, he muſt leave to their conſideration every thing which goes to the conſtitution of ſuch a general verdict, and is therefore bound to permit them to come to, and to direct them how to form that general concluſion from the law and the fact, which is involved in the term guilty. For it is ridiculous ſay, that guilty is a fact, it is a concluſion in law from a fact, and therefore can have no place in a ſpecial verdict, where the legal concluſion is left to the court.

In this caſe the defendant is charged, not with having publiſhed this pamphlet, but with having publiſhed a certain falſe, ſcandalous, and ſeditious libel, with a ſeditious and rebellious intention. He pleads that he is not guilty in manner and form as he is accuſed; which plea is admitted on all hands to be a denial of the whole charge, and conſequently does not merely put in iſſue, the fact of publiſhing the pamphlet; but the truth of the whole indictment, *i. e.* the publication of the libel ſet forth in it with the intention charged by it.

When this iſſue comes down for trial, the jury muſt either find the whole charge or a part of it; and admitting for argument ſake, that the judge has a right to dictate either of theſe two courſes; he is undoubtedly bound in law to make his direction to the jury conformable to the one or the other. If he means to confine the jury to the fact of publiſhing, conſidering the guilt of the defendant to be a legal concluſion for the court to draw from that fact, ſpecially found on the record: he ought to direct the jury to find that fact without affixing the epithet of guilty to the finding. But, if he will have a general verdict of guilty, which involves a judgment of law as well as fact; he muſt leave the law to the conſideration of the jury. For when the word guilty is pronounced by them, it is ſo well underſtood to comprehend every thing charged by the indictment, that the

aſſociate or his clerk inſtantly records, that the defendant is guilty in manner and form as he is accuſed, i. e. not ſimply that he has publiſhed the pamphlet contained in the indictment; but that he is guilty of publiſhing *the libel* with the wicked intentions charged on him by the record.

Now, if this effect of a general verdict of guilty is reflected on for a moment, the miſdirection of directing one upon the bare fact of publiſhing, will appear in the moſt glaring colours. The learned judge ſays to the jury, Whether this be a libel is not for your conſideration; I can give no opinion on that ſubject without injuſtice to the proſecutor; and as to what Mr. Jones ſwore concerning the defendant's motives for the publication, that is likewiſe not before you: for, if you are ſatisfied in point of fact that the defendant publiſhed this pamphlet, you are bound to find him *guilty*. Why guilty, my lord, when the conſideration of guilt is withdrawn? He confines the jury to the finding of a fact, and enjoins them to leave the legal concluſion from it to the court; yet, inſtead of directing them to make that fact the ſubject of a ſpecial verdict, he deſires them in the ſame breath to find a general one: to draw the concluſion without any attention to the premiſes: to pronounce a verdict which upon the face of the record includes a judgment upon their oaths that the paper is a libel, and that the publiſher's intentions in publiſhing it were wicked and ſeditious, although neither the one nor the other made any part of their conſideration.

My lord, ſuch a verdict is a monſter in law, without precedent in former times, or root in the conſtitution. If it be true, on the principle of the charge itſelf, that the fact of publication was all that the jury were to find, and all that was neceſſary to eſtabliſh the defendant's guilt, if the thing publiſhed be a libel; Why was not that fact found like all other facts upon ſpecial verdicts? Why was an epithet, which is a legal concluſion from the fact, extorted from a jury who were reſtrained from forming it themſelves? The verdict muſt be taken to be general or ſpecial: if general, it has found the whole iſſue without

a co-extenſive examination. If ſpecial, the word guilty which is a concluſion from facts can have no place in it.

Either this word guilty is operative or uneſſential; an epithet of ſubſtance, or of form. It is impoſſible to controvert that propoſition, and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real ſubſtance, or, to ſpeak more plainly, that the fact of publication found ſpecially, without the epithet of guilty, would have been an imperfect verdict inconcluſive of the defendant's guilt, and on which no judgment could have followed: then it is impoſſible to deny that the defendant has ſuffered injuſtice, becauſe ſuch an admiſſion confeſſes that a criminal concluſion from a fact has been obtained from the jury, without permitting them to exerciſe that judgment which might have led them to a concluſion of innocence: and that the word guilty has been obtained from them at the trial as a mere matter of form, although the verdict without it, ſtating only the fact of publication which they were directed to find, to which they thought the finding alone enlarged, and beyond which they never enlarged their enquiry, would have been an abſolute verdict of acquittal.

If, on the other hand, to avoid this inſuperable objection to the charge, the word guilty is to be reduced to a mere word of form, and it is to be contended that the fact of publication found ſpecially would have been tantamount; be it ſo: let the verdict be ſo recorded; let the word guilty be expunged from it, and I inſtantly ſit down; I trouble your lordſhips no further; I withdraw my motion for a new trial, and will maintain in arreſt of judgment, that the Dean is not convicted. But if this is not conceded to me, and the word guilty though argued to be but form, and though as ſuch obtained from the jury, is ſtill preſerved upon the record, and made uſe of againſt the defendant as ſubſtance; it will then become us, (independant of all conſideration as lawyers,) to conſider a little how that argument is to be made conſiſtent with the honour of gentlemen, or that fairneſs of dealing which cannot but have place wherever juſtice is adminiſtered.

But

But in order to eſtabliſh that the word guilty is a word of eſſential ſubſtance; that the verdict would have been imperfect without it; and that therefore the defendant ſuffers by its inſertion; I undertake to ſhew your lordſhip, upon every principle and authority of law, that if the fact of publication, which was all that was left to the jury, had been found by ſpecial verdict, no judgment could have been given on it.

My lord, I will try this by taking the fulleſt finding which the facts in evidence could poſſibly have warranted. Suppoſing then, for inſtance, that the jury had found that the defendant publiſhed the paper according to the tenor of the indictment: that it was written of and concerning the King and his Government; and that the innuendos were likewiſe as averred, K meaning the preſent King, and P the preſent parliament of Great Britain: on ſuch a finding, no judgment could have been given by the court, even if the record had contained a compleat charge of a libel. No principle is more unqueſtionable than that to warrant any judgment upon a ſpecial verdict, the court which can preſume nothing that is not viſible on the record, muſt ſee ſufficient matter upon the face of it, which, if taken to be true, is concluſive of the defendant's guilt. They muſt be able to ſay, If this record be true, the defendant cannot be innocent of the crime which it charges on him. But from the facts of ſuch a verdict the court could arrive at no ſuch legitimate concluſion; for it is admitted on all hands, and indeed expreſsly laid down by your lordſhip in the caſe of the King againſt Woodfall, that publication even of a libel is not *concluſive* evidence of guilt; for that the defendant may give evidence of an innocent publication.

Looking therefore upon a record containing a good indictment of a libel, and a verdict finding that the defendant publiſhed it; but without the epithet of guilty, the court could not pronounce that he publiſhed it with the malicious intention which is the eſſence of the crime: they could not ſay what might have paſſed at the trial: for any thing that appeared to them he might have given ſuch evidence of innocent motive, neceſſity, or miſtake, as might have amounted to excuſe

or juſtification. They would ſay that the facts ſtated upon the verdict would have been fully ſufficient in the abſence of a legal defence to have warranted the judge to have directed, and the jury to have given a general verdict of guilty, comprehending the intention which conſtitutes the crime: but that to warrant the bench which is ignorant of every thing at the trial, to preſume that intention, and thereupon to pronounce judgment on the record, the jury muſt not merely find full evidence of the crime, but ſuch facts as compoſe its legal definition. This wiſe principle is ſupported by authorities which are perfectly familiar.

If, in an action of trover, the plaintiff proves property in himſelf, poſſeſſion in the defendant, and a demand and refuſal of the thing charged to be converted; this evidence unanſwered is full proof of a converſion; and if the defendant could not ſhew to the jury why he had refuſed to deliver the plaintiff's property on a legal demand of it, the judge would direct them to find him guilty of the converſion. But on the ſame facts found by ſpecial verdict, no judgment could be given by the court: the judges would ſay, If the ſpecial verdict contains the whole of the evidence given at the trial, the jury ſhould have found the defendant guilty; for the converſion was fully proved, but we cannot declare theſe facts to amount to a converſion, for the defendant's intention was a fact which the jury ſhould have found from the evidence, over which we have no juriſdiction.

So in the caſe put by Lord Coke, I believe in his firſt Inſtitute 115. If a modus is found to have exiſted beyond memory till within thirty years before the trial, the court cannot upon ſuch facts found by ſpecial verdict pronounce againſt the modus: but any one of your lordſhips would certainly tell the jury, that upon ſuch evidence they were warranted in finding againſt it.

In all caſes of preſcription, the univerſal practice of judges is to direct juries by analogy to the ſtatute of limitations to decide againſt incorporeal rights, which for many years have been relinquiſhed; but ſuch modern relinquiſhments, if ſtated upon the record by ſpecial verdict, would in no inſtance warrant a judgment againſt any preſcription.

ſcription. The principle of the difference is obvious and univerſal: the court looking at a record can preſume nothing; it has nothing to do with reaſonable probabilities, but is to eſtabliſh legal certainties by its judgments. Every crime is like every other complex idea, capable of a legal definition: if all the component parts which go to its formation are put as facts upon the record, the court can pronounce the perpetrator of them a criminal: but if any of them are wanting, it is a chaſm in fact, and cannot be ſupplied. Wherever intention goes to the eſſence of the charge, it muſt be found by the jury; it muſt be either comprehended under the word guilty in the general verdict, or ſpecifically found as a fact by the ſpecial verdict. This was ſolemnly decided by the court in Huggins's caſe, in ſecond Lord Raymond, 1581, which was a ſpecial verdict of murder from the Old Bailey.

It was an indictment againſt John Huggins, and James Barnes, for the murder of Edward Arne. The indictment charged that Barnes made an aſſault upon Edward Arne, being in the cuſtody of the other priſoner Huggins, and detained him for ſix weeks in a room newly built over the common ſewer of the priſon, where he languiſhed and died: the indictment further charged, that Barnes and Huggins well knew that the room was unwholeſome and dangerous: the indictment then charged that the priſoner Huggins of his malice aforethought was preſent, aiding, and abetting Barnes, to commit the murder aforeſaid. This was the ſubſtance of the indictment.

The ſpecial verdict found that Huggins was warden of the Fleet by letters patent: that the other priſoner Barnes was ſervant to Gibbons Huggins, deputy in the care of all the priſoners, and of the deceaſed a priſoner there. That the priſoner Barnes, on the 7th of September, put the deceaſed Arne in a room over the common ſewer which had been newly built, knowing it to be newly built, and damp, and ſituated as laid in the indictment: *and that fifteen days before the priſoner's death,* HUGGINS *likewiſe well knew that the room was new built, damp, and ſituated as laid. They found that fifteen days before the death* of the priſoner, Huggins was preſent

ſent in the room, and ſaw him there under dureſs of imprisonment, *but then and there turned away, and Barnes locked the door, and that from that time till his death the deceaſed remained locked up.*

It was argued before the twelve judges in Serjeants Inn, whether Huggins was guilty of murder. It was agreed that he was not anſwerable *criminally*, for the act of his deputy, and could not be guilty, unleſs the criminal intention was brought perſonally home to himſelf. And it is remarkable how ſtrongly the judges required the fact of knowledge and malice, to be ſtated on the face of the verdict, as oppoſed to *evidence* of intention, and inference from a fact.

The court ſaid, it is chiefly relied on that Huggins was preſent in the room, and ſaw Arne *ſub duritie imprisonamenti, et ſe avertit*; but he might be preſent and not know all the circumſtances; the words are VIDIT *ſub duritie*; but he might *ſee* him under dureſs, and not *know* he was under dureſs: it was anſwered that ſeeing him under dureſs evidently means he knew he was under dureſs; but ſays the court "*we cannot take things by inference in this manner; his ſeeing is but evidence of his knowledge of theſe things, and therefore the jury, if the fact would have borne it, ſhould have found that Huggins knew he was there without his conſent, which not being done we cannot intend theſe things nor infer them; we muſt judge of facts, and not from the evidence of facts*; and cited Keylnge, 78; that whether a man be aiding and abetting a murder is matter of act, and ought to be expreſly found by a jury.

The application of theſe laſt principles and authorities to the caſe before the court is obvious and ſimple.

The criminal intention is a fact, and muſt be found by the jury: and that finding can only be expreſſed upon the record by the general verdict of guilty which comprehends it, or by the ſpecial enumeration of ſuch facts as do not merely amount to evidence of, but which completely and concluſively conſtitute the crime. But it has been ſhewn, and is indeed admitted, that the publication of a libel is only *prima facie* evidence of the complex charge in the indictment, and not ſuch a fact as amounts

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in itſelf when ſpecially ſtated to concluſive guilt; ſince as the judges cannot tell how the criminal inference from the fact of publiſhing a libel, might have been rebutted at the trial; no judgment can follow from a ſpecial finding, that the defendant publiſhed the paper indicted according to the tenor laid in the indictment.

It follows from this, that if the jury had only found the fact of publication, which was all that was left to them, *without affixing the epithet of guilty*, which could be only legally affixed by an inveſtigation not permitted to them; a *venire facias de novo* muſt have been awarded becauſe of the uncertainty of the verdict as to the criminal intention: whereas it will now be argued that if the court ſhall hold the dialogue to be a libel, the defendant is fully convicted; becauſe the verdict does not merely find that he publiſhed, which is a finding conſiſtent with innocence, but finds him GUILTY of publiſhing, which is a finding of the criminal publication charged by the indictment.

My lord, how I ſhall be able to defend my innocent client againſt ſuch an argument, I am not prepared to ſay; I feel all the weight of it; but that feeling ſurely entitles me to greater attention, when I complain of that which ſubjects him to it, without the warrant of the law. It is the weight of ſuch an argument that entitles me to a new trial; for the Dean of St. Aſaph is not only found guilty, without any inveſtigation of his guilt by the jury, but without that queſtion being even open to your lordſhips on the record. Upon the record the court can only ſay the dialogue is, or is not a libel; but if it ſhould pronounce it to be one, the criminal intention of the defendant in publiſhing it is taken for granted by the word guilty; although it has not only not been tried, but evidently appears from the verdict itſelf, not to have been found by the jury. Their verdict is, "guilty of "publiſhing, but whether a libel or not they do not "find." And it is therefore impoſſible to ſay that they can have found a criminal motive in publiſhing a paper, on the criminality of which they have formed no judgment. Printing and publiſhing that which is legal, contains in it no crime; the guilt muſt ariſe from the publication

lication of a libel; and there is therefore a palpable repugnancy on the face of the verdict itſelf, which firſt finds the Dean guilty of publiſhing, and then renders the finding a nullity, by pronouncing ignorance in the jury whether the thing publiſhed comprehends any guilt.

To conclude this part of the ſubject, the epithet of guilty (as I ſet out with at firſt) muſt either be taken to be ſubſtance, or form. If it be ſubſtance, and as ſuch, concluſive of the *criminal* intention of the publiſher, ſhould the thing publiſhed be hereafter adjudged to be a libel; I aſk a new trial, becauſe the defendant's guilt in that reſpect has been found without having been tried: If on the other hand, the word GUILTY is admitted to be but a word of form, then let it be expunged, and I am not hurt by the verdict.

Having now eſtabliſhed, according to my two firſt propoſitions, that the jury upon every general iſſue, joined in a criminal caſe, have a conſtitutional juriſdiction over the whole charge, I am next in ſupport of my third, to contend, that the caſe of a libel forms no legal exception to the general principles which govern the trial of all other crimes, that the argument for the difference, viz. becauſe the whole charge always appears on the record, is falſe in fact, and that even if true, it would form no ſubſtantial difference in law.

As to the firſt, I ſtill maintain that the whole caſe does by no means neceſſarily appear on the record; the crown may indict part of the publication, which may bear a criminal conſtruction when ſeparated from the context, and the context omitted having no place in the indictment, the defendant can neither demur to it, nor arreſt the judgment after a verdict of guilty; becauſe the court is abſolutely circumſcribed by what appears on the record, and the record contains a legal charge of a libel.

I maintain likewiſe, that according to the principles adopted upon this trial, he is equally ſhut out from ſuch defence before the jury; for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publiſhing the matter which is contained in the

indictment,

indictment, however its innocence may be eſtabliſhed by a view of the whole work. The only operation, which looking at the context can have upon a jury is, to convince them that the matter upon the record, however libellous when taken by itſelf, was not intended to convey the meaning which the words indicted import in language, when ſeparated from the general ſcope of the writing: but upon the principle contended for, they could not acquit the defendant upon any ſuch opinion, for that would be to take upon them the prohibited queſtion of libel, which is ſaid to be matter of law for the court.

My learned friend Mr. Bearcroft, appealed to his audience with an air of triumph, whether any ſober man could believe, that an Engliſh jury in the caſe I put from Algernon Sidney would convict a defendant of publiſhing the Bible, ſhould the crown indict a member of a verſe which was blaſphemous in itſelf if ſeparated from the context. My lord, if my friend had attended to me, he would have found that in conſidering ſuch ſuppoſition as an abſurdity, he was only repeating my own words. I never ſuppoſed that a jury would act ſo wickedly, or ſo abſurdly, in a caſe where the principle contended for by my friend Mr. Bearcroft, carried ſo palpable a face of injuſtice, as in the inſtance which I ſelected to expoſe it; and which I therefore ſelected to ſhew that there were caſes in which the ſupporters of the doctrine were aſhamed of it, and obliged to deny its operation: for it is impoſſible to deny that if the jury can look at the context in the caſe put by Sidney, and acquit the defendant on the merits of the thing publiſhed; they may do it in caſes which will directly operate againſt the principle he ſeems to ſupport. This will appear from other inſtances, where the injuſtice is equal, but not equally ſtriking.

Suppoſe the crown were to ſelect ſome paſſage from Locke upon government, as for inſtance; "that there "was no difference *between the king and the conſtable when* "*either of them exceeded their authority.*" That aſſertion under certain circumſtances if taken by itſelf without the context, might be highly ſeditious, and the queſtion therefore would be *quo animo* it was written: perhaps the real meaning of the ſentence might not be diſcoverable

by the immediate context without a view of the whole chapter, perhaps of the whole book; therefore to do juſtice to the defendant, upon the very principle by which Mr. Bearcroft in anſwering Sidney's caſe can alone acquit the publiſher of his bible, the jury muſt look into the whole eſſay on government, and form a judgment of the deſign of the author, and the meaning of his work.

Lord Mansfield. To be ſure they may judge from the whole work.

Mr. Erſkine. And what is this, my lord, but determining the queſtion of libel which is denied to day: for if a jury may acquit the publiſher of any part of Mr. Locke on government, from a judgment ariſing out of a view of the whole book, though there be no innuendos to be filled up as facts in the indictment; what is it that bound the jury to convict the Dean of St. Aſaph, as the publiſher of Sir William Jones's dialogue, on the bare fact of publication, without the right of ſaying that his obſervations as well as Mr. Locke's, were ſpeculative, abſtract, and legal?

Lord Mansfield. They certainly may in all caſes go into the whole context.

Mr. Erſkine. And why may they go into the context? clearly, my lord, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be ſubmitted to them by averments in the indictment, and therefore the very permiſſion to look at the context for ſuch a purpoſe, (where there are no innuendos to be filled up by them as facts,) is a palpable admiſſion of all I am contending for, viz. the right of the jury to judge of the merits of the paper, and the intention of its author.

But it is ſaid that though a jury have a right to decide that a paper criminal as far as it appears on the record, is nevertheleſs legal when explained by the whole work of which it is a part; yet that they ſhall have no right to ſay that the whole work itſelf if it happens to be all indicted, is innocent and legal. This propoſition, my lord, upon the bare ſtating of it, ſeems too prepoſterous to be ſeriouſly entertained; yet there is no alternative between maintaining

maintaining it in its full extent, and abandoning the whole argument.

If the defendant is indicted for publiſhing part of the verſe in the pſalms, " There is no God," it is aſſerted that the jury may look at the context, and ſeeing that the whole verſe did not maintain that blaſphemous propoſition, but only that the fool had ſaid ſo in his heart, may acquit the defendant upon a judgment that it is no libel, to impute ſuch imagination to a fool: but if the whole verſe had been indicted, viz. " the fool has ſaid " in his heart there is no God :" the jury on the principle contended for, would be reſtrained from the ſame judgment of its legality, but muſt convict of blaſphemy on the fact of publiſhing, leaving the queſtion of libel untouched on the record.

If in the ſame manner, only part of this very dialogue had been indicted inſtead of the whole, it is ſaid even by your lordſhip, that the jury might have read the context, and then, notwithſtanding the fact of publiſhing, might have collected from the whole, its abſtract and ſpeculative nature, and have acquitted the defendant upon that judgment of it; and yet it is contended that they have no right to form the ſame judgment of it upon the preſent occaſion, although the whole be before them upon the face of the indictment; but are bound to convict the defendant upon the fact of publiſhing, notwithſtanding they ſhould have come to the ſame judgment of its legality which it is admitted they might have come to on trying an indictment for the publication of a part. Really, my lord, the abſurdities and groſs departures from reaſon, which muſt be hazarded to ſupport this doctrine are endleſs.

The criminality of the paper is ſaid to be a queſtion of law, yet the meaning of it from which alone the legal interpretation can ariſe, is admitted to be a queſtion of fact. If the text be ſo perplexed and dubious as to require innuendos to explain, to point, and to apply obſcure expreſſion or conſtruction, the jury alone as judges of fact, are to interpret and to ſay what ſentiments the author muſt have meant to convey by his writing: yet if the writing be ſo plain and intelligible as to require no

averments of its meaning, it then becomes ſo obſcure and myſterious as to be a queſtion of law, and beyond the reach of the very ſame men who but a moment before were interpreters for the judges; and though its object be moſt obviouſly peaceable and its author innocent, they are bound to ſay upon their oaths, that it is wicked and ſeditious and the publiſher of it guilty.

As a queſtion of fact the jury are to try the real ſenſe and conſtruction of the words indicted, by comparing them with the context, and yet if that context itſelf which affords the compariſon makes part of the indictment, the whole becomes a queſtion of law; and they are then bound down to convict the defendant on the fact of publiſhing it, without any juriſdiction over the meaning. To complete the juggle, the intention of the publiſher may likewiſe be ſhewn as a fact, by the evidence of any extrinſic circumſtances, ſuch as the context to explain the writing, or the circumſtances of miſtake or ignorance under which it was publiſhed, and yet in the ſame breath, the intention is pronounced to be an inference of law from the act of publication, which the jury cannot exclude, but which muſt depend upon the future judgment of the court.

But the danger of this ſyſtem, is no leſs obvious than its abſurdity. I do not believe that its authors ever thought of inflicting death upon Engliſhmen, without the interpoſition of a jury; yet its eſtabliſhment would unqueſtionably extend to annihilate the ſubſtance of that trial in every proſecution for high treaſon, where the publication of any writing was laid as the overt act. I illuſtrated this by a caſe when I moved for a rule, and called upon my friends for an anſwer to it, but no notice has been taken of it by any of them; this was juſt what I expected: when a convincing anſwer cannot be found to an objection, thoſe who underſtand controverſy never give ſtrength to it by a weak one.

I ſaid, and I again repeat, that if an indictment charges that a defendant did traiterouſly intend, compaſs, and imagine the death of the king; and in order to carry ſuch treaſon into execution, publiſhed a paper which it ſets out literatim on the face of the record, the principle

ciple which is laid down to day would ſubject that perſon to the pains of death by the ſingle authority of the judges, without leaving any thing to the jury, but the bare fact of publiſhing the paper. For, if that fact were proved, and the defendant called no witneſſes, the judge who tried him would be warranted, nay bound in duty by the principle in queſtion, to ſay to the jury, Gentlemen, the overt act of treaſon charged upon the defendant, is the publication of this paper, intending to compaſs the death of the King; the fact is proved, and you are therefore bound to convict him: the treaſonable intention is an inference of law from the act of publiſhing; and if the thing publiſhed does not upon a future examination intrinſically ſupport that inference, the court will arreſt the judgment, and your verdict will not affect the priſoner.

My lord, I will reſt my whole argument upon the analogy between theſe two caſes, and give up every objection to the doctrine when applied to the one, if upon the ſtricteſt examination it ſhall not be found to apply equally to the other.

If the ſeditious intention be an inference of law, from the fact of publiſhing the paper which this indictment charges to be a libel, is not the treaſonable intention equally an inference from the fact of publiſhing that paper, which the other indictment charges to be an overt act of treaſon? In the one caſe as in the other, the writing or publication of a paper is the whole charge; and the ſubſtance of the paper ſo written or publiſhed makes all the difference between the two offences. If that ſubſtance be matter of law where it is a ſeditious libel, it muſt be matter of law where it is an act of treaſon: and if becauſe it is law the jury are excluded from judging it in the one inſtance, their judgment muſt ſuffer an equal abridgment in the other.

The conſequence is obvious. If the jury by an appeal to their conſciences are to be thus limited in the free exerciſe of that right which was given them by the conſtitution, to be a protection againſt judicial authority where the weight and majeſty of the crown is put into the ſcale againſt an obſcure individual, the freedom of the

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preſs is at an end: for how can it be ſaid that the preſs is free becauſe every thing may be publiſhed without a previous licence, if the publiſher of the moſt meritorious work which the united powers of genius and patriotiſm ever gave to the world, may be proſecuted by information of the king's attorney general, without the conſent of the grand jury, may be convicted by the petty jury, on the mere fact of publiſhing, (who indeed without perjuring themſelves muſt on this ſyſtem inevitably convict him) and muſt then depend upon judges who may be the ſupporters of the very adminiſtration whoſe meaſures are queſtioned by the defendant, and who muſt therefore either give judgment againſt him or againſt themſelves.

To all this Mr. Bearcroft ſhortly anſwers, Are you not in the hands of the ſame judges, with reſpect to your property and even to your life, when ſpecial verdicts are found in murder, felony, and treaſon; in theſe caſes do priſoners run any hazard from the application of the law by the judges, to the facts found by the juries? Where can you poſſibly be ſafer?

My lord, this is an argument which I can anſwer without indelicacy or offence, becauſe your lordſhip's mind is much too liberal to ſuppoſe, that I inſult the court by general obſervations on the principles of our legal gogernment: however ſafe we might be, or might think ourſelves, the conſtitution never intended to inveſt judges with a diſcretion, which cannot be tried and meaſured by the plain and palpable ſtandard of law; and in all the caſes put by Mr. Bearcroft, no ſuch looſe diſcretion is exerciſed as muſt be entertained by a judgment on a ſeditious libel, and therefore the caſes are not parallel.

On a ſpecial verdict for murder, the life of the priſoner does not depend upon the religious, moral, or philoſophical ideas of the judges, concerning the nature of homicide: no, precedents are ſearched for, and if he is condemned at all, he is judged exactly by the ſame rule as others have been judged by before him; his conduct is brought to a preciſe, clear, intelligible ſtandard, and cautiouſly meaſured by it: it is the law therefore and not the judge which condemns him. It is the ſame

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in all indictments, or civil actions for ſlander upon individuals.

Reputation is a perſonal right of the ſubject, indeed the moſt valuable of any, and it is therefore ſecured by law, and all injuries to it clearly aſcertained: whatever ſlander hurts a man in his trade, ſubjects him to danger of life, liberty, or loſs of property, or tends to render him infamous, is the ſubject of an action, and in ſome inſtances of an indictment. But in all theſe caſes where the *malus animus* is found by the jury, the judges are in like manner a ſafe repoſitory of the legal conſequence; becauſe ſuch libels may be brought to a well known ſtandard of ſtrict and poſitive law; they leave no diſcretion in the judges: the determination of what words when written or ſpoken of another are actionable, or the ſubject of an indictment, leaves no more latitude to a court ſitting in judgment on the record, than a queſtion of title does in a ſpecial verdict in ejectment.

But I beſeech your lordſhip, to conſider by what rule the legality or illegality of this dialogue, is to be decided by the court as a queſtion of law upon the record. Mr. Bearcroft has admitted in the moſt unequivocal terms, (what indeed it was impoſſible for him to deny,) that every part of it when viewed in the abſtract was legal; but he ſays, there is a great diſtinction to be taken between ſpeculation and exhortation, and that it is this latter which makes it a libel. I readily accede to the truth of the obſervation, but how your lordſhip is to determine that difference as a queſtion of law, is paſt my comprehenſion: for if the dialogue in its phraſe and compoſition be general, and its libellous tendency ariſes from the purpoſe of the writer, to raiſe diſcontent by a ſeditious application of legal doctrines; that purpoſe is ſurely a queſtion of fact if ever there was one, and muſt therefore be diſtinctly avered in the indictment, to give the cognizance of it as a fact to the jury, without which no libel can poſſibly appear upon the record: this is well known to be the only office of the innuendo; becauſe the judges can preſume nothing which the ſtricteſt rules of grammar, do not warrant them to collect intrinſically from the writing itſelf.

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Circumſcribed by the record, your lordſhip can form no judgment of the tendency of this dialogue to excite ſedition by any thing but the mere words: you muſt look at it as if it was an old manuſcript dug out of the ruins of Herculaneum; you can collect nothing from the time when, or the circumſtances under which it was publiſhed; the perſon by whom, and thoſe amongſt whom it was circulated; yet theſe may render a paper at one time, and under ſome circumſtances, dangerouſly wicked and ſeditious, which at another time, and under different circumſtances, might be innocent and even highly meritorious.

If puzzled by a taſk ſo inconſiſtent with the real ſenſe and ſpirit of judicature, your lordſhips ſhould ſpurn the fetters of the record, and judging with the reaſon rather than the infirmities of men, ſhould take into your conſideration, the ſtate of men's minds on the ſubject of equal repreſentation at this moment, and the great diſpoſition of the preſent times to revolution in government: if reading the record with theſe impreſſions, your lordſhips ſhould be led to a judgment not warranted by an abſtract conſideration of the record, then beſides that ſuch a judgment would be founded on facts not in evidence before the court, and not within its juriſdiction if they were; let me further remind your lordſhips, that even if theſe objections to the premiſes were removed, the concluſion would be no concluſion of law: your deciſion on the ſubject might be very ſagacious as politicians, as moraliſts, as philoſophers, or as licencers of the preſs, but they would have no reſemblance to the judgments of an Engliſh court of juſtice, becauſe it could have no warrant from the acts of your predeceſſors, nor afford any precedent to your ſucceſſors.

But all theſe objections are perfectly removed, when the ſeditious tendency of a paper is conſidered as a queſtion of fact: we are then relieved from the abſurdity of a legal diſcuſſion ſeparated from all the facts from which alone the law can ariſe; for the jury can do what (as I obſerved before) your lordſhips cannot do in judging by the record; they can examine by evidence all thoſe circumſtances that lead to eſtabliſh the ſeditious tendency of the

the paper from which the court is ſhut out: they may know themſelves, or it may be proved before them, that it has excited ſedition already: they may collect from witneſſes that it has been widely circulated, and ſeditiouſly underſtood; or, if the proſecution (as is wiſeſt) precedes theſe conſequences, and the reaſoning muſt be a priori, ſurely gentlemen living in the country are much better judges than your lordſhip, what has or has not a tendency to diſturb the neighbourhood in which they live, and that very neighbourhood is the forum of criminal trial.

If they know that the ſubject of the paper is the topic that agitates the country around them; if they ſee danger in that agitation, and have reaſon to think that the publiſher muſt have intended it; they ſay he is guilty. If, on the other hand, they conſider the paper to be legal, and enlightening in principle; likely to promote a ſpirit of activity and liberty in times when the activity of ſuch a ſpirit is eſſential to the public ſafety, and have reaſon to believe it to be written and publiſhed in that ſpirit; they ſay, as they ought to do, that the writer or the publiſher is not guilty. Whereas your lordſhip's judgment upon the language of the record muſt ever be in the pure abſtract; operating blindly and indiſcriminately upon all times, circumſtances, and intentions, making no diſtinction between the glorious attempts of a Sidney or a Ruſſel, ſtruggling againſt the terrors of deſpotiſm under the Stuarts; and thoſe deſperate adventurers of the year forty-five, who libelled the perſon, and excited rebellion againſt the mild and gracious government of our late excellent ſovereign King George the ſecond.

My lord, if the independent gentlemen of England are thus better qualified to decide from cauſe of knowledge, it is no offence to the court to ſay, that they are full as likely to decide with impartial juſtice as judges appointed by the crown. Your lordſhips have but a life intereſt in the public property, but they have an inheritance in it for their children. Their landed property depends upon the ſecurity of the government, and no man who wantonly attacks it can hope or expect to eſcape from the ſelfiſh lenity of a jury. On the firſt principles

of human action they muſt lean heavily againſt him. It is only when the pride of Engliſhmen is picqued by ſuch doctrines as I am oppoſing to-day, that they think it better to ſcreen the guilty by an indiſcriminate oppoſition to them, than ſurrender thoſe rights by which alone innocence in the day of danger can be protected.

I venture therefore to ſay, in ſupport of one of my original propoſitions, that where a writing indicted as a libel, neither contains, nor is averred by the indictment to contain any ſlander of an individual, ſo as to fall within thoſe rules of law which protect perſonal reputation, but whoſe criminality is charged to conſiſt (as in the preſent inſtance) in its tendency to ſtir up general diſcontent, that the trial of ſuch an indictment neither involves, nor can in its obvious nature involve any abſtract queſtion of law for the judgment of a court, but muſt wholly depend upon the judgment of the jury on the tendency of the writing itſelf, to produce ſuch conſequences, when connected with all the circumſtances which attended its publication.

It is unneceſſary to puſh this part of the argument further, becauſe I have heard nothing from the bar againſt the poſition which it maintains; none of the gentlemen have, to my recollection, given the court any one ſingle reaſon, good or bad, why the *tendency* of a paper to ſtir up diſcontent againſt government, ſeparated from all the circumſtances which are ever ſhut out from the record, ought to be conſidered as an abſtract queſtion of law: they have not told us where we are to find any matter in the books to enable us to argue ſuch queſtions before the court; or where your lordſhips yourſelves are to find a rule for your judgments on ſuch ſubjects. I confeſs that to me it looks more like legiſlation, or arbitrary power, than Engliſh judicature. If the court can ſay, this is a criminal writing, *not* becauſe we know that miſchief was intended by its author, or is even contained in itſelf, but becauſe fools believing the one and the other may do miſchief in their folly; the ſuppreſſion of ſuch writings under particular circumſtances may be wiſe policy in a ſtate, but upon what principle it can be criminal law in England

land to be ſettled in the abſtract by judges, I confeſs with humility, that I have no organs to underſtand.

Mr. Leyceſter felt the difficulty of maintaining ſuch a propoſition by any argument of law, and therefore had recourſe to an argument of fact. "If (ſays my learned "friend) what is or is not a ſeditious libel, be not a queſ-"tion of law for the court, but of fact for the jury, upon "what principle do defendants found guilty of ſuch libels "by a general verdict, defeat the judgment for error on "the record: and what is ſtill more in point, upon what "principle does Mr. Erſkine himſelf, if he fails in his "preſent motion, mean to aſk your lordſhips to arreſt "this very judgment by ſaying that the dialogue is not "a libel."

My lord, the obſervation is very ingenious, and God knows the argument requires that it ſhould; but it is nothing more. The arreſt of judgment which follows after a verdict of guilty for publiſhing a writing, which on inſpection of the record exhibits to the court no ſpecific offence againſt the law, is no impeachment of my doctrine: I never denied ſuch a juriſdiction to the court. My poſition is, that no man ſhall be puniſhed for the criminal breach of any law, until a jury of his equals have pronounced him guilty in mind as well as in act. *Actus non facit reum niſi mens ſit rea.*

But I never aſſerted that a jury had the power to make criminal law as well as to adminiſter it; and therefore it is clear that they cannot deliver over a man to puniſhment if it appears by the record of his accuſation, which is the office of judicature to examine, that he has not offended againſt any poſitive law; becauſe however criminal he may have been in his diſpoſition, which is a fact eſtabliſhed by the verdict, yet ſtatute and precedents can alone decide what is by law an *indictable* offence.

If, for inſtance, a man were charged by an indictment with having held a diſcourſe in words highly ſeditious, and were found guilty by the jury, it is evident that it is the province of the court to arreſt that judgment; becauſe though the jury have found that he ſpoke the words as laid in the indictment, with the ſeditious intention charged upon him, which they, and they only could find;

yet as the words are not puniſhable by indictment, as when committed to writing, the court could not pronounce judgment: the declaration of the jury that the defendant was guilty in manner and form as accuſed, could evidently never warant a judgment, if the accuſation itſelf contained no charge of an offence againſt the law.

In the ſame manner, if a butcher were indicted for privately putting a ſheep to cauſeleſs and unneceſſary torture in the exerciſe of his trade, but not in public view ſo as to be productive of evil example, and the jury ſhould find him guilty, I am afraid that no judgment could follow; becauſe though done *malo animo*, yet neither ſtatute nor precedent have perhaps determined it to be an indictable offence; it would be difficult to draw the line. An indictment would not lie for every inhuman neglect of the ſufferings of the ſmalleſt innocent animals which providence has ſubjected to us,

> Yet the poor beetle which we tread upon,
> In corporal ſuffering feels a pang as great
> As when a giant dies.

A thouſand other inſtances might be brought of acts baſe and immoral, and prejudicial in their conſequences, which are not yet indictable by law.

In the caſe of the King againſt Brewer, in Cowper's reports, it was held that *knowingly* expoſing to ſale and ſelling gold under ſterling for ſtandard gold, is not indictable; becauſe the act refers to goldſmiths only, and private cheating is not a common-law offence.

Here too the declaration of the jury that the defendant is guilty in manner and form as accuſed, does not change the nature of the accuſation: the verdict does not go beyond the charge; and if the charge be invalid in law, the verdict muſt be invalid alſo.

All theſe caſes therefore, and many ſimilar ones which might be put, are clearly conſiſtent with my principle; I do not ſeek to erect jurors into legiſlators or judges: there muſt be a rule of action in every ſociety which it is the duty of the legiſlature to create, and of judicature to expound when created. I only ſupport their right to determine

termine guilt or innocence where the crime charged is blended by the general iſſue with the intention of the criminal; more eſpecially when the quality of the act itſelf even independent of that intention, is not meaſurable by any preciſe principle or precedent of law, but is inſeparably connected with the time when, the place where, and the circumſtances under which the defendant acted.

My lord, in conſidering libels of this nature as oppoſed to ſlander on individuals to be mere queſtions of fact, or at all events to contain matter fit for the determination of the jury; I am ſupported not only by the general practice of courts, but even of thoſe very practiſers themſelves, who in proſecuting for the crown have maintained the contrary doctrine.

Your lordſhips will I am perſuaded admit that the general practice of the profeſſion, more eſpecially of the very heads of it, proſecuting too for the public, is ſtrong evidence of the law. Attorney generals have ſeldom entertained ſuch a jealouſy of the king's judges in ſtate proſecutions, as to lead them to make preſents of juriſdiction to juries, which did not belong to them of right by the conſtitution of the country. Neither can it be ſuppoſed, that men in high office and of great experience, ſhould in every inſtance (though differing from each other in temper, character, and talents) uniformly fall into the ſame abſurdity of declaiming to juries upon topics totally irrelevant, when no ſuch inconſiſtency is found to diſfigure the profeſſional conduct of the ſame men in other caſes. Yet I may appeal to your lordſhip's recollection, without having recourſe to the ſtate trials, whether upon every proſecution for a ſeditious libel within living memory, the attorney general has not uniformly ſtated ſuch writings at length to the jury, pointed out their ſeditious tendency which rendered them criminal; and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the crown was to be founded.

On the trial of Mr. Horne, for publiſhing an advertiſement in favour of the widows of thoſe American ſubjects who had been *murdered* by the king's troops at

Lex-

Lexington; Did the preſent chancellor, then attorney general, content himſelf with ſaying that he had proved the publication, and that the criminal quality of the paper which raiſed the legal inference of guilt againſt the defendant, was matter for the court? no, my lord, he went at great length into its dangerous and pernicious tendency, and applied himſelf with ſkill and ability to the underſtandings and the conſciences of the jurors. This inſtance is in itſelf deciſive of his opinion: that great magiſtrate could not have acted thus upon the principle contended for to day: he never was an idle declaimer; cloſe and maſculine argument is the characteriſtic of his underſtanding.

The character and talents of the late Lord Chief Juſtice De Grey, no leſs intitles me to infer his opinion from his uniform conduct.

In all ſuch proſecutions while he was in office, he held the ſame language to juries, and particularly in the caſe of the King againſt Woodfall, *(to uſe the expreſſion of a celebrated writer on the occaſion,)* he tortured his faculties for more than two hours, to convince them that Junius's letter was a libel.

The opinions of another crown lawyer, who has ſince paſſed through the higheſt offices of the law, and filled them with the higheſt reputation, I am not driven to collect alone from his language as an attorney general; becauſe he carried them with him to the ſeat of juſtice. Yet one caſe is too remarkable to be omitted.

Lord Camden proſecuting Doctor Shebbeare, told the jury that he did not deſire their verdict upon any other principle, than their ſolemn conviction of the truth of the information, which charged the defendant with a wicked deſign, to alienate the hearts of the ſubjects of this country from their king upon the throne.

To compleat the account: My learned friend Mr. Bearcroft, (though laſt not leaſt in favour) upon this very occaſion, ſpoke above an hour to the jury at Shrewſbury, to convince them of the libellous tendency of the dialogue, which ſoon afterwards the learned judge deſired them wholly to diſmiſs from their conſideration, as matter with which they had no concern. The real fact

is,

is, that the doctrine is too abſurd to be acted upon; too diſtorted in principle, to admit of conſiſtency in practice: it is contraband in law, and can only be ſmuggled by thoſe who introduce it: it requires great talents and great addreſs to hide its deformity: in vulgar hands it becomes contemptible.

Having ſupported the rights of juries, by the uniform practice of crown lawyers, let us now examine the queſtion of authority, and ſee how this court itſelf and its judges have acted upon trials for libels in former times; for according to Lord Raymond in Franklin's caſe (as cited by Mr. Juſtice Buller, at Shrewſbury,) the principle I am ſupporting, had it ſeems been only broached about the year 1731. by ſome men of party ſpirit, and then too for the very firſt time.

My lord, ſuch an obſervation in the mouth of Lord Raymond, proves how dangerous it is to take up as doctrine every thing flung out at *niſi prius*; above all upon ſubjects which engage the paſſions and intereſts of government. Becauſe the moſt ſolemn and important trials with which hiſtory makes us acquainted; diſcuſſed too at the bar of this court; and when filled with judges the moſt devoted to the crown, gives the moſt deciſive contradiction to ſuch an unfounded and unguarded aſſertion.

In the famous caſe of the ſeven biſhops, the queſtion of libel or no libel was held unanimouſly by the court of King's Bench trying the cauſe at the bar, to be matter for the conſideration and determination of the jury; and the biſhops petition to the king, which was the ſubject of the information, was accordingly delivered to them, when they withdrew to conſider of their verdict.

Thinking this caſe deciſive, I cited it at the trial, and the anſwer it received from Mr. Bearcroft was, that it had no relation to the point in diſpute between us, for that the biſhops were acquitted not upon the queſtion of libel, but becauſe the delivery of the petition to the king was held to be no publication.

I was not a little ſurpriſed at this ſtate of it, but my turn of ſpeaking was then paſt; fortunately to day it is my privilege to ſpeak laſt, and I have now lying before me

me the fifth volume of the ſtate trials, where the caſe of the biſhops is printed, and where it appears that the publication was expreſsly proved; that nothing turned upon it in the judgment of the court; and that the charge turned wholly upon the queſtion of libel, which was expreſsly left to the jury by every one of the judges. Lord Chief Juſtice Wright, in ſumming up the evidence, told them, that a queſtion had at firſt ariſen about the publication, it being inſiſted on that the delivery of the petition to the king had not been proved; that the court was of the ſame opinion, and that he was juſt going to have directed them to find the biſhops not guilty, when in came my lord preſident (ſuch ſort of witneſſes were no doubt always at hand when wanted) who proved the delivery to his majeſty. Therefore, continued the chief juſtice, if you believe it was the ſame petition, it is a publication ſufficient, and we muſt therefore come to enquire whether it be a libel.

He then gave his reaſons for thinking it within the caſe *de libellis famoſis*, and concluded, by ſaying to the jury, "In ſhort, I muſt give you my opinion: I do "take it to be a libel; if my brothers have any thing to "ſay to it, I ſuppoſe they will deliver their opinion." What opinion? not that the jury had no juriſdiction to judge of the matter, but an opinion for the expreſs purpoſe of enabling them to give that judgment which the law required at their hands.

Mr. Juſtice Holloway then followed the chief juſtice, and ſo pointedly was the queſtion of libel or no libel, and not the publication, the only matter which remained in doubt, and which the jury with the aſſiſtance of the court were to decide upon; that when the learned judge went into the facts which had been in evidence, the chief juſtice ſaid to him, "Look you by the way, brother, "I did not aſk you to ſum up the evidence, but only to "deliver your opinion to the jury, whether it be a libel "or no." The chief juſtice's remark, though it proves my poſition, was however very unneceſſary; for but a moment before, Mr. Juſtice Holloway had declared he did not think it was a libel, but addreſſing himſelf to the jury had ſaid, "*it is left to you, gentlemen.*"

Mr.

Mr. Juſtice Powell who likewiſe gave his opinion that it was no libel, ſaid *to the jury*, " *But the matter of it is* " *before you, and I leave the iſſue of it to God and your own* " *conſciences.*" And ſo little was it in the idea of any one of the court, that the jury ought to found their verdict ſolely upon the evidence of the publication, without attending to the criminality or innocence of the petition; that the chief juſtice himſelf conſented, on their withdrawing from the bar, that they ſhould carry with them all the materials for coming to a judgment as comprehenſive as the charge; and indeed expreſsly directed that the information, the libel, the declarations under the great ſeal, and even the ſtatute-book, ſhould be delivered to them.

The happy iſſue of this memorable trial, in the acquittal of the biſhops by the jury, exerciſing juriſdiction over the whole charge, freely admitted to them as legal even by King James's judges, is admitted by two of the gentlemen to have prepared and forwarded the glorious æra of the revolution. Mr. Bower, in particular, ſpoke with ſingular enthuſiaſm concerning this verdict, chuſing (for reaſons ſufficiently obvious) to aſcribe it to a ſpecial miracle wrought for the ſafety of the nation, rather than to the right lodged in the jury to ſave it by its laws and conſtitution.

My learned friend finding his argument like nothing upon the earth, was obliged to aſcend into heaven to ſupport it: having admitted that the jury not only acted like juſt men towards the biſhops, but as patriot citizens towards their country, and not being able without the ſurrender of his whole argument, to allow either their public ſpirit, or their private juſtice to have been conſonant to the laws, he is driven to make them the inſtruments of divine providence to bring good out of evil, and holds them up as men inſpired by God to perjure themſelves in the adminiſtration of juſtice, in order by-the-by to defeat the effects of that wretched ſyſtem of judicature which he is defending to-day as the conſtitution of England. For if the king's judges could have decided the petition to be a libel, the Stuarts might yet have been on the throne.

My lord, this is the argument of a prieſt, not of a lawyer; and even if faith and not law were to govern the queſtion, I ſhould be as far from ſubſcribing to it as a religious opinion.

No man believes more firmly than I do, that God governs the whole univerſe by the gracious diſpenſations of his providence, and that all the nations of the earth riſe and fall at his command: but then this wonderful ſyſtem is carried on by the natural (though to us the often hidden) relation between effects and cauſes, which wiſdom adjuſted from the beginning, and which foreknowledge at the ſame time rendered ſufficient, without diſturbing either the laws of nature or of civil ſociety.

The proſperity and greatneſs of empires ever depended, and ever muſt depend upon the uſe their inhabitants make of their reaſon in deviſing wiſe laws, and the ſpirit and virtue with which they watch over their juſt execution; and it is impious to ſuppoſe, that men who have made no proviſion for their own happineſs or ſecurity in their attention to their government, are to be ſaved by the interpoſition of heaven in turning the hearts of their tyrants to protect them.

But if every caſe in which judges have left the queſtion of libel to juries in oppoſition to law, is to be conſidered as a miracle, England may vie with Paleſtine; and Lord Chief Juſtice Holt ſteps next into view as an apoſtle: for that great judge, in Tutchin's caſe, left the queſtion of libel to the jury in the moſt unambiguous terms? After ſumming up the evidence of writing and publiſhing, he ſaid to them as follows,

"You have now heard the evidence, and you are to "conſider whether Mr. Tutchin be guilty. They ſay "they are innocent papers, and no libels; and they ſay "nothing is a libel but what reflects upon ſome particu- "lar perſon. But this is a very ſtrange doctrine, to ſay, "it is not a libel reflecting on the government, endea- "vouring to poſſeſs the people that the government is "male-adminiſtered by corrupt perſons, that are em- "ployed in ſuch or ſuch ſtations either in the navy or "army.

"To

" To ſay that corrupt officers are appointed to admi-
" niſter affairs, is certainly a reflection on the govern-
" ment. If people ſhould not be called to account for
" poſſeſſing the people with an ill opinion of the govern-
" ment, no government can ſubſiſt. For it is very ne-
" ceſſary for all governments that the people ſhould have
" a good opinion of it: and nothing can be worſe to
" any government, than to endeavour to procure animo-
" ſities, as to the management of it; this has been al-
" ways looked upon as a crime, and no government can
" be ſafe without it be puniſhed."

Having made theſe obſervations, did the chief juſtice tell the jury that whether the publication in queſtion fell within that principle ſo as to be a libel on government, was a matter of law for the court, with which they had no concern?—Quite the contrary: he conſidered the ſeditious tendency of the paper as a queſtion for their ſole determination, ſaying to them;

" Now you are to conſider, whether theſe words I
" have read to you, do not tend to beget an ill opinion
" of the adminiſtration of the government? To tell us,
" that thoſe that are employed know nothing of the
" matter, and thoſe that do know are not employed.
" Men are not adapted to offices, but offices to men,
" out of a particular regard to their intereſt, and not to
" their fitneſs for the places; this is the purport of theſe
" papers."

In citing the words of judges in judicature I have a right to ſuppoſe their diſcourſe to be pertinent and relevant, and that when they ſtate the defendant's anſwer to the charge, and make remarks on it, they mean that the jury ſhould exerciſe a judgment under their direction: this is the practice we muſt certainly impute to Lord Holt, if we do him the juſtice to ſuppoſe that he meant to convey the ſentiments which he expreſſed. So that when we came to ſum up this caſe, I do not find myſelf ſo far behind the learned gentleman even in point of expreſs authority; putting all reaſon, and the analogies of law which unite to ſupport me, wholly out of the queſtion.

There

There is court of king's bench againſt court of king's bench; Chief Juſtice Wright againſt Chief Juſtice Lee; and Lord Holt againſt Lord Raymond: as to living authorities it would be inviduous to claſs them, but it is a point on which I am ſatisfied myſelf, and on which the world will be ſatisfied likewiſe if ever it comes to be a queſtion.

But even if I ſhould be miſtaken in that particular, I cannot conſent implicitly to receive any doctrine as the law of England, though pronounced to be ſuch by magiſtrates the moſt reſpectable, if I find it to be in direct violation of the very firſt principles of Engliſh judicature. The great juriſdictions of the country are unalterable but by parliament, and until they are changed by that authority, they ought to remain ſacred; the judges have no power over them. What parliamentary abridgment has been made upon the rights of juries ſince the trial of the biſhops, or ſince Tutchin's caſe, when they were fully recognized by this court? None. Lord Raymond and Lord Chief Juſtice Lee ought therefore to have looked there to their predeceſſors for the law, inſtead of ſetting up a new one for their ſucceſſors.

But ſuppoſing the court ſhould deny the legality of all theſe propoſitions, or admitting their legality, ſhould reſiſt the concluſions I have drawn from them; then I have recourſe to my laſt propoſition, in which I am ſupported even by all thoſe authorities on which the learned judge relies for the doctrines contained in his charge; to wit,

"That in all caſes where the miſchievous intention "(which is agreed to be the eſſence of the crime) cannot "be collected by ſimple inference from the fact charged, "becauſe the defendant goes into evidence to rebut ſuch "inference, the intention becomes then a pure un-"mixed queſtion of fact, for the conſideration of the "jury."

I ſaid the authorities of the King againſt Woodfall and Almon were with me. In the firſt, which is reported in 5th Burrow, your lordſhip expreſſed yourſelf thus. "Where an act in itſelf indifferent, becomes criminal, "when done with a particular intent, there the intent "muſt

" muſt be proved and found. But where the act is it-
" ſelf unlawful (as in the caſe of a libel) the PROOF of
" juſtification or excuſe, lies on the defendant; *and in*
" *failure thereof, the law implies a criminal intent.*" Moſt luminouſly expreſſed to convey this ſentiment, viz. that when a man publiſhes a libel, and has nothing to ſay for himſelf, no explanation or exculpation, a criminal intention need not be proved: I freely admit that it need not; it is an inference of common ſenſe, not of law. But the publication of a libel does not excluſively ſhew criminal intent, but is only an implication of law, in failure of the defendant's proof. Your Lordſhip immediately afterwards in the ſame caſe explained this further. " There
" may be caſes where the publication may be juſtified or
" excuſed as lawful OR INNOCENT; FOR NO FACT
" WHICH IS NOT CRIMINAL *though the paper* BE
" A LIBEL can amount to SUCH a publication of which
" a defendant ought to be found guilty." But no queſtion of that kind aroſe at the trial (i. e. on the trial of Woodfall.) Why? Your lorſhip immediately explained why, " *Becauſe the defendant called no witneſſes,*" expreſsly ſaying, that the publication of a libel is not in itſelf a crime, unleſs the intent be criminal. And that it is not merely in mitigation of puniſhment, but that *ſuch* a publication does not warrant a verdict of guilty.

In the caſe of the King againſt Almon, a magazine containing one of Junius's letters, was ſold at Almon's ſhop; there was proof of that ſale at the trial. Mr. Almon called no witneſſes, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon, that he was not privy to the ſale, nor knew his name was inſerted as a publiſher; and that this practice of bookſellers being inſerted as publiſhers by their correſpondents without notice, was common in the trade.

Your lordſhip ſaid, " Sale of a book in a bookſeller's
" ſhop, is *prima facie* evidence of publication by the
" maſter, and the publication of a libel is *prima facie*
" evidence of criminal intent: it ſtands good till anſwer-
" ed by the defendant: it muſt ſtand till contradicted or
" explained, *and if not contradicted, explained, or excul-*
" *pated,*

" *pated*, BECOMES *tantamount to concluſive when the de-*
" *fendant calls no witneſſes.*"

Mr. Juſtice Aſton ſaid, " *Prima facie* evidence *not an-*
" *ſwered* is ſufficient to ground a verdict upon: if the
" defendant had a ſufficient excuſe, he might have proved
" it at the trial: his having neglected it where there was
" no ſurpriſe, is no ground for a new one." Mr. Juſtice Willes and Mr. Juſtice Aſhhurſt agreed upon thoſe expreſs principles.

Theſe caſes declare the law beyond all controverſy to be, that publication even of a libel, is no concluſive proof of guilt, but only *prima facie* evidence of it till anſwered; and that if the defendant can ſhew that his intention was not criminal, he completely rebuts the inference ariſing from the publication; becauſe though it remains true that he publiſhed, yet, according to your lordſhip's expreſs words, it is not ſuch a publication of which a defendant ought to be found guilty. Apply Mr. Juſtice Buller's ſumming up, to this law, and it does not require even a legal apprehenſion to diſtinguiſh the repugnancy.

The advertiſement was proved to convince the jury of the Dean's motive for publiſhing; Mr. Jones's teſtimony went ſtrongly to it, and the evidence to character, though not ſufficient in itſelf, was admiſſible to be thrown into the ſcale. But not only no part of this was left to the jury, but the whole of it was expreſsly removed from their conſideration, although in the caſes of Woodfall and Almon, it was as expreſsly laid down to be within their cognizance, and a compleat anſwer to the charge if ſatisfactory to the minds of the jurors.

In ſupport of the learned judge's charge, there can be therefore but the two arguments, which I ſtated on moving for the rule: either that the defendant's evidence, namely the advertiſement; Mr. Jones's evidence in confirmation of its being *bona fide*; and the evidence to character, to ſtrengthen that conſtruction, were not ſufficient proof that the Dean believed the publication meritorious, and publiſhed it in vindication of his honeſt intentions: or elſe, that even admitting it to eſtabliſh that fact, it did not amount to ſuch an exculpation as to be

evidence

evidence on not guilty, ſo as to warrant a verdict. I ſtill give the learned judge the choice of the alternative.

As to the firſt, viz. whether it ſhewed honeſt intention in point of fact: that was a queſtion for the jury. If the learned judge had thought it was not ſufficient evidence to warrant the jury's believing that the Dean's motives were ſuch as he had declared them; I conceive he ſhould have given his opinion of it as a point of evidence, and left it there. I cannot condeſcend to go further; it would be to argue a ſelf-evident propoſition.

As to the ſecond, viz. that even if the jury had believed from the evidence, that the Dean's intention was wholly innocent, it would not have warranted them in acquitting, and therefore ſhould not have been left to them upon not guilty; that argument can never be ſupported. For, if the jury had declared, "We find that "the Dean publiſhed this pamphlet, whether a libel or "not we do not find: and we find further, that be-"lieving it in his conſcience to be meritorious and in-"nocent, he, *bona fide*, publiſhed it with the prefixed "advertiſement, as a vindication of his character from "the ſeditious intentions, and not to excite ſedition." It is impoſſible to ſay, without ridicule, that on ſuch a ſpecial verdict the court could have pronounced a criminal judgment?

Then why was the conſideration of that evidence, by which thoſe facts might have been found, withdrawn from the jury, after they brought in a verdict guilty of publiſhing ONLY, which in the King againſt Woodfall, was only ſaid not to negative the criminal intention, becauſe the defendant called no witneſſes? Why did the learned judge confine his enquiries to the innuendos, and finding them agreed in, direct the epithet of guilty, without aſking the jury if they believed the defendant's evidence to rebut the criminal inference? Some of them poſitively meant to negative the criminal inference, by adding the word only, and all would have done it, if they had thought themſelves at liberty to enter upon that evidence. But they were told expreſsly that they had nothing to do with the conſideration of that evidence, which, if believed, would have warranted that verdict. The conclu-

cluſion is evident; if they had a right to conſider it, and their conſideration might have produced ſuch a verdict, and if ſuch a verdict would have been an acquittal, it muſt be a miſdirection.

" But," ſays Mr. Bower, " if this advertiſement " prefixed to the publication, by which the Dean pro- " feſſed his innocent intention in publiſhing it, ſhould " have been left to the jury as evidence of that inten- " tion, to found an acquittal on, even taking the dia- " logue to be a libel; no man could ever be convicted " of publiſhing any thing however dangerous: for he " would only have to tack an advertiſement to it by way " of preface, profeſſing the excellence of its principles " and the ſincerity of his motives, and his defence would " be compleat."

My lord, I never contended for any ſuch poſition. If a man of education, like the Dean, were to publiſh a writing ſo palpably libellous, that no ignorance or miſ-apprehenſion imputable to ſuch a perſon could prevent his diſcovering the miſchievous deſign of the author; no jury would believe ſuch an advertiſement to be *bona fide*, and would therefore be bound in conſcience to reject it, as if it had no exiſtence: the effect of ſuch evidence muſt be to convince the jury of the defendant's purity of mind, and muſt therefore depend upon the nature of the writing itſelf, and all the circumſtances attending its publication.

If upon reading the paper and conſidering the whole of the evidence, they have reaſon to think that the defendant did not believe it to be illegal, and did not publiſh it with the ſeditious purpoſe charged by the indictment; he is not guilty upon any principle or authority of law, and would have been acquitted even in the ſtar-chamber: for it was held by that court in Lambe's caſe, in the eighth year of King James the firſt, as reported by Lord Coke who then preſided in it; that every one who ſhould be convicted of a libel, muſt be the writer or contriver, or a *malicious* publiſher *knowing* it to be a libel.

This caſe of Lambe being of too high authority to be oppoſed, and too much in point to be paſſed over: Mr. Bower

Bower endeavours to avoid its force by giving it a new conſtruction of his own: he ſays, that not knowing a writing to be a libel, in the ſenſe of that caſe, means, not knowing the contents of the thing publiſhed; as by conveying papers ſealed up, or having a ſermon and a libel, and delivering one by miſtake for the other. In ſuch caſes he ſays, *ignorantia facti excuſat*, becauſe the mind does not go with the act; *ſed ignorantia legis non excuſat*; and therefore if the party knows the contents of the paper which he publiſhes, his mind goes with the act of publication tho' he does not find out any thing criminal, and he is bound to abide by the legal conſequences.

This is to make criminality depend upon the conſciouſneſs of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law: for whatever they do is attended with conſciouſneſs, though their underſtanding does not reach to the conſciouſneſs of offence.

The publication of a libel, not believing it to be one after having read it, is a much more favourable caſe than publiſhing it unread by miſtake; the one, nine times in ten is a culpable negligence which is no excuſe at all; for a man cannot throw papers about the world without reading them, and afterwards ſay he did not know their contents were criminal: but if a man reads a paper, and not believing it to contain any thing ſeditious, having collected nothing of that tendency himſelf; publiſhes it among his neighbours as an innocent and uſeful work, he cannot be convicted as a criminal publiſher. How he is to convince the jury that his purpoſe was innocent, though the thing publiſhed be a libel, muſt depend upon circumſtances; and theſe circumſtances he may on the authority of all the caſes antient and modern, lay before the jury in evidence; becauſe if he can eſtabliſh the innocence of his mind, he negatives the very giſt of the indictment.

"In all crimes," ſays Lord Hale in his pleas of the crown, "the intention is the principal conſideration: "it is the mind that makes the taking of another's goods "to be felony, or a bare treſpaſs only: it is impoſſible "to preſcribe all the circumſtances evidencing a feloni-

" ous intent, or the contrary; but the ſame muſt be left " to the attentive conſideration of judge *and jury*; " wherein the beſt rule is in dubiis, rather to incline to " acquittal than conviction."

In the ſame work he ſays, " By the ſtatute of Philip " and Mary, touching importation of coin, coun- " terfeit of foreign money, it muſt to make it treaſon, " be the intent to utter and make payment of the ſame; " and the intent in this caſe may be tried and found by " circumſtances of FACT, by words, letters, and a thou- " ſand evidences beſides the bare doing of the fact."

This principle is illuſtrated by frequent practice, where the intention is found by the jury as a fact in a ſpecial verdict.

It occurred not above a year ago, at Eaſt Grinſtead, on an indictment for burglary, before Mr. Juſtice Aſhurſt, where I was myſelf counſel for the priſoner. It was clear upon the evidence that he had broken into the houſe by force in the night, but I contended that it appeared from proof, that he had broken and entered with an intent to reſcue his goods, which had been ſeized that day by the officers of exciſe; which reſcue though a capital felony by modern ſtatute, was but a treſpaſs, temp. Henry viii. and conſequently not a burglary.

Mr. Juſtice Aſhurſt ſaved this point of law, which the twelve judges afterwards determined for the priſoner; but in order to create the point of law, it was neceſſary that the priſoner's intention ſhould be aſcertained as a fact; and for this purpoſe, the learned judge directed the jury to tell him with what intention, they found that the priſoner broke and entered the houſe, which they did by anſwering; " To reſcue his goods," which verdict was recorded.

In the ſame manner in the caſe of the King againſt Pierce, at the Old Bailey, the intention was found by the jury as a fact in the ſpecial verdict. The priſoner having hired a horſe and afterwards ſold him, was indicted for felony; but the judges doubting whether it was more than a fraud, unleſs he originally hired him intending to ſell him, recommended it to the jury to find a ſpecial verdict, comprehending their judgment of

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his intention, from the evidence. Here the quality of the act depended on the intention, which intention it was held to be the exclusive province of the jury to determine, before the judges could give the act any legal denomination.

My lord, I am ashamed to have cited so many authorities to establish the first elements of the law, but it has been my fate to find them disputed. The whole mistake arises from confounding criminal with civil cases. If a printer's servant without his master's consent or privity, inserts a slanderous article against me in his newspaper, I ought not in justice to indict him; and if I do, the jury *on such proof* should acquit him; but it is no defence to an action, for he is responsible to me civiliter for the damage which I have sustained from the news-paper, which is his property. Is there any thing new in this principle? so far from it that every student knows it as applicable to all other cases; but people are resolved from some fatality or other, to distort every principle of law into nonsense, when they come to apply them to printing; as if none of the rules and maxims which regulate all the transactions of society had any reference to it.

If a man rising in his sleep, walks into a china shop, and breaks every thing about him; his being asleep is a compleat answer to an indictment for a trespass, but he must answer in an action for every thing he has broken.

If the proprietor of the York coach, though asleep in his bed at that city, has a drunken servant on the box in London, who drives over my leg and breaks it, he is responsible to me in damages for the accident; but I cannot indict him as the criminal author of my misfortune. What distinction can be more obvious and simple.

Let us only then extend these principles, which were never disputed in other criminal cases, to the crime of publishing a libel; and let us at the same time allow to the jury as our forefathers did before us, the same jurisdiction in that instance, which we agree in rejoicing to allow them in all others, and the system of English law will be wise, harmonious, and compleat.

My lord, I have now finished my argument, having answered the several objections to my five original propositions

poſitions, and eſtabliſhed them by all the principles and authorities which appear to me to apply, or to be neceſſary for their ſupport. In this proceſs I have been unavoidably led into a length not more inconvenient to the court than to myſelf, and have been obliged to queſtion ſeveral judgments which had been before queſtioned and confirmed.

They however who may be diſpoſed to cenſure me for the zeal which has animated me in this cauſe, will at leaſt, I hope, have the candour to give me credit for the ſincerity of my intentions: it is ſurely not my intereſt to ſtir oppoſition to the decided authorities of the court in which I practice: with a ſeat here within the bar, at my time of life, and looking no farther than myſelf, I ſhould have been contented with the law as I found it, and have conſidered *how little* might be ſaid with decency, rather than *how much*; but feeling as I have ever done upon the ſubject, it was impoſſible I ſhould act otherwiſe. It was the firſt command and council to my youth, always to do what my conſcience told me to be my duty, and to leave the conſequences to God. I ſhall carry with me the memory, and I hope, the practice of this parental leſſon to the grave: I have hitherto followed it, and have no reaſon to complain that the adherence to it has been even a temporal ſacrifice; I have found it on the contrary, the road to proſperity and wealth, and ſhall point it out as ſuch to my children. It is impoſſible in this country to hurt an honeſt man; but even if it were, I ſhould little deſerve that title, if I could upon any principle, have conſented to tamper or temporiſe with a queſtion which involves in its determination and its conſequences, the liberty of the preſs; and in that liberty, the very exiſtence of every part of the public freedom.

END OF MR. ERSKINE'S SPEECH.

Mr.

Mr. WELCH.

My Lord,

I AM of the ſame ſide with Mr. Erſkine.—And after the full diſcuſſion, which my learned friend has beſtowed on every part of the important ſubject, ſubmitted to your lordſhips, for your determination this day; it will not, I am ſure, be thought neceſſary, for my client's intereſt, that I ſhould take up much of the time of the court—I ſhall endeavour to confine myſelf, in my obſervations, principally, to a conſideration of the origin, and progreſſive application of the hackneyed maxim ſo much relied on in different periods of legal hiſtory, and which the gentlemen on the other ſide wiſh to make uſe of on the preſent occaſion.—I mean the maxim, *ad queſtionem facti non reſpondent judices, ad queſtionem legis non reſpondent juratores.*—Upon the true legal conſtruction of which, it ſeems to be agreed, the preſent queſtion in a great meaſure depends; as if this was intended to mark the diſtinct office of judge and jury.

To a plain man, but ſlightly acquainted with the firſt rudiments of our juriſprudence, it may appear reaſonable and right, that the law ſhould be explained by the one, and the fact determined by the other; and the maxim is admitted without heſitation. But it has always ſtruck my mind, that this poſition, though true in principle, has been oftentimes greatly miſapplied. It was never intended *to mark out diſtinct and ſeparate juriſdictions of the judge and jury at* NISI PRIUS, independent and excluſive of each other.

I will not pretend to ſay in what page of *Bracton* or *Fleta* we are to look for the origin of it; but ſure I am, that in the time of thoſe writers, it could never be underſtood in the ſenſe which is now attempted to be put upon it; as it would be contradicting ſome of the beſt authenticated facts in legal hiſtory.

I take it, my lord, that this is one of thoſe ſignificant and comprehenſive ſentences, which it was the amuſement of our old lawyers to frame, in order to convey in the ſhorteſt poſſible way, the grounds and principles of our law; and that, by this maxim, they in truth meant

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no more than to ſay, "That, in the law of England it "was the courſe of judicial proceedings, for all matters "of law to be put to the judges to be determined upon; "and all matters of fact to the jury;" and ſo it is; but how? Not (according to my poor judgment,) in the way marked out by the learned judge at niſi prius upon the trial of this indictment; but it meant this, that an iſſue of law when it aroſe *in pleading* ſhould be put by the party to the judges, and an iſſue of fact to the jury. If it is a point of law which the party pleads, *he prays the judgment of the court upon it*; and the court in giving their opinion on ſuch prayer, may be truly ſaid in the language of this maxim, *reſpondere*. If it is a point of fact, *he prays it may be enquired of by the country*, to which prayer the verdict of the jury may be conſidered as a *reſponſe*. Should a party in pleading do the reverſe of this, and pray that a point of law might be enquired of by the jury, or pray the judgment of the court on a matter of fact, then would this maxim of the law *ad queſtionem facti non reſpondent judices, ad queſtionem juris non reſpondent juratores*, be juſtly applied; which in other words, would be ſaying, you ſhould, according to an old maxim of the law, have concluded to the court in one inſtance, and in the other, to the country.

This, my lord, I take to be the true ſenſe and drift of the wiſe and ſententious maxim ſo much obſerved upon. And I do ſeriouſly beg leave to contend, that it is not a rule for governing a trial by jury; but, if any thing, a rule and maxim of pleading. That it is not a rule for governing a trial by jury, I ſay, appears from the practice of the courts in the time when this maxim gained birth, and from the uniform and almoſt univerſal practice from thence, down to the preſent times, in all judicial inquiries, whether of a civil or a criminal nature.

But now, when the changes of time and circumſtances, have rendered the appearance of things ſomewhat complicated, and arguments are raiſed on different ſides, concerning their true nature; I know no promiſing method of inveſtigation, but to recur to firſt principles—And the firſt principles of our law are to be looked for in its ancient hiſtory. We find in the early periods of our

our juriſprudence, that, notwithſtanding the parties litigant, might ſelect ſome point of law or fact, to reſt their caſe upon; yet the ſimplicity of thoſe times, gave ſuch indulgence to the unlettered defendant, as to allow him to make a mere general denial of the charge; which denial, muſt of neceſſity involve in it, both the fact and the law ariſing upon the fact, and therefore was properly called *a general iſſue*.

Here then an allegation was made, which contained both law and fact, and there needed ſome expoſition of the maxim *ad queſtionem facti*, &c. and *ad queſtionem legis*, &c. to determine the party in the *prayer* he was to make for the trial of the iſſue; which, as it contained both law and fact, did not, by the terms of the maxim, ſeem to belong ſingly to either: and the interpretation which the law has given in this inſtance, is peculiarly deſerving of obſervation; for, as the plea was general, it was held the trial ſhould be general alſo; and ſhould therefore go to one, only, of the two tribunals; and ſuch preference was given to the fact, before the law, and ſo much more ſacred was the privilege of trial conſidered than the prerogative of judgment, that rather than the fact ſhould not be tried by the proper juriſdiction, the wiſdom of our anceſtors ordained, that the law, alſo, ſhould be determined by the ſame authority; that is, in the language of the law at this day, that a general iſſue ſhould conclude to the country. Thus, my lord, if I may parody a maxim of the imperial code, it ſeems to be a rule of our law, and a rule of evidence in general iſſues, that *jus ſequitur forum facti*.

As a proof of this, (and a ſtrong one, conſidering the nature of the trial,) may be adduced the trial in a writ of right by battle. When the iſſue was joined upon the mere right, and the combatants were produced to decide the iſſue, the law as well as fact were in their hands; and we hear of no judge, who felt ſuch jealouſy for the ſuppoſed duty of his office, as to interpoſe between the batoons of the champions, *flagrante bello*, and claim part of the debate, as the ſhare which peculiarly belonged to him to try his ſtrength at, and to decide upon. If this ſeems extravagant and ridiculous, it is no fault of mine, the

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principle is the ſame when applied to this mode of trial and to others; and if the conſequences in this inſtance, diſplay the abſurdity of it, more than in others, it only anſwers, more happily, the purpoſe of a juſt criterion. This was the uſual method of trying a general iſſue, in the early part of Henry II. and the preceding times, up to the conqueſt; and extended to moſt other caſes, beſides a writ of right, whether criminal or civil. When the *aſſize* and the *jury* were introduced by that wiſe prince, in the place of the duel, there was yet no alteration in the particular ſubject now in queſtion; the aſſize in ſome actions, and the jury in others, were ſubſtituted for the duel, but no law, no book, no record, no authority, printed or written, can be produced, to ſhew that any ſeparation was then made between the law and the fact, but they were now given together, to the jurors, in the ſame manner, as to the combatants; as appears plainly from the forms of pleading, and from the authority of our old books and ſtatutes.

To take one inſtance and examine it. The iſſue of *nul tort*, *nul diſſeiſin*, was the general iſſue in an aſſize of novel diſſeiſin, and the tenant, conſiſtently with this ancient maxim, and the expoſition upon it, concluded by putting himſelf upon the aſſize for the truth of his denial. The aſſize, therefore, by the terms of the writ and record, were authorized and COMPELLED, to conſider of every thing which would enable them to ſay, whether the tenant had committed the diſſeiſin with which he was charged; and every one knows, that this might turn upon various points, which could only be determined upon legal ideas, and diſtinctions; an entry, a deſcent, a deed, and the like. The jurors were bound, difficult as it may ſeem, to take into their conſideration many matters of this kind, before they were able to pronounce their concluſion, whether the tenant committed a diſſeiſin or not; and in doing this rightly, and according to law, they acted under the penalty of an attaint. The danger into which unlettered jurors were brought by having all this burden of determining the law thrown upon their ſhoulders, was taken into conſideration of the parliament in the time of Edward I. and when the act for

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appointing juſtices of *niſi prius* was made, in ſtat. 2. Weſt. cha. 30. this was thought, as your lordſhip remembers, a proper occaſion to provide ſome relief for jurors, and it was enacted, " That the juſtices for taking aſſizes ſhould " not COMPELL the jurors to ſay preciſely whether it was " a diſſeiſin or no, ſo as they are willing to ſpeak the " truth of the fact, and require aid of the juſtices; " but if they, of their own head, will ſay that it is diſ- " ſeiſin, their verdict ſhall be admitted at their own " peril."

This, your lordſhip ſees, was intended to exonerate ſuch jurors as felt and expreſſed themſelves to be burdened with ſome part of their duty; but this was, provided they found *the truth of the fact*; and it was never meant to *deprive* them of the right to decide the law, or ſo much of it as they pleaſed to retain, much leſs to avoid deciding on any part of the fact.

Now, my lord, what was the law and the practice in taking aſſizes after this act? When the parliament had thus recognized the poſſibility of matter ariſing, which the judge would decide upon better than the jurors, did the judge, preſuming upon that parliamentary intimation, make a diviſion and apportionment of the matter ariſing at the trial of the aſſize, and did he venture to tell the jurors, " This is matter of fact, and this is matter of " law; the latter I will take to myſelf to conſider upon, " *You have nothing to do with it.*" Do we find this to have been the conduct of judges? I believe if ever there had been an example of it, ſome diſcerning juror might and would have ventured to expoſtulate in the terms of plain common ſenſe, " My lord, we are ſworn to try, " whether the demandant unjuſtly, and without judg- " ment, diſſeized the tenant, and the whole caſe has " been laid before us; we chuſe, as it is our duty, to de- " cide the *whole* matter between the parties; but how " are we to perform that duty, if you take part of the " matter from us." The good ſenſe of the judges of thoſe days, prevented ſuch complaints, by eſtabliſhing a courſe conformable with the old principle of trials, and the practice recognized by the ſtatute; they took upon them to explain ſuch matters of law, as it ſhould ſeem

the jurors would wiſh to be *adviſed upon*, and ſo left the fact, accompanied with that *advice*, to be decided upon by the jurors; who ſtill, as formerly, gave in the general verdict of diſſeiſin or no diſſeiſin, if they ſo pleaſed.

The ſtatute I have been mentioning, introduced nothing new, except this, that ignorant judges were no longer to throw off their ſhoulders, the burden of determining points of law, *compelling* the jurors to find it, and run the hazard of an attaint, if it turned out to be a wrong verdict in point of law. This is very different from the caſe of which we now complain. Before this ſtatute, it was the uſage for jurors to take the advice of judges, who were able and diſpoſed to give it, and upon ſuch advice, they found, if they pleaſed, a general verdict; or, if they were inclined, they might, before that act, have found the ſpecial matter, as is the opinion of Lord Coke, (2 Inſt. 425) and left the concluſion upon it for the judgment of the court. It is, therefore, partly by the equity of this ſtatute, and partly from the former practice in other caſes, that the modern method has obtained of a jury trying a general iſſue, and finding a general verdict after they had received the advice of the judge.

When judges had been long in the habit of doing their duty, by aſſiſting the jurors with their *advice* in all matters of doubt, and that perhaps too readily; and when we conſider the manner in which this is now tranſacted at *niſi prius*, I do not wonder, that the maxim which has been ſo often mentioned, ſhould be applied in the ſenſe contended for by the gentlemen on the other ſide. If a matter of law ariſes, the counſel (without the jury praying the *advice* of the judge) turns round to the bench ſtating a point which is for his *lordſhip's* conſideration; the counſel on the other ſide do the ſame; the jury are at a diſtance, perfectly ignorant of what is going forward, and ready enough to acquieſce in what they are told plainly, or is plainly to be collected, viz. *that they have nothing at all to do with the matter*; and ſo it turns out; for after a ſort of private converſation between the judge and counſel, his lordſhip tells the jury that the matter is ſo and ſo, and they *muſt* find a verdict accordingly;

cordingly. When a perſon has been often witneſs to ſuch a method of ordering a trial, upon a general iſſue, I do not wonder, that, before due conſideration, he ſhould be led into the idea, that the office of the judge was an independant and ſeparate one, from that of the jury; and finding ſuch a maxim as this in queſtion, readily adopt it to explain the above appearance. And the learned judge ſeems to me to have reſorted to it to ſupport his preſent direction to the jury.

But no man, who reflects a moment, or who has traced the nature of a trial, upon the general iſſue, from the firſt origin of our law, would be long deceived, by the appearance of things, into ſuch a miſconception; he would readily enough acknowledge the propriety of ſuch an addreſs to the judge, on a point of law; he would admit, that the jury did right, in acquieſcing to receive that *advice* in the firſt inſtance, which upon their own requeſt they are intitled to expect from the judge; but he would be able to reconcile both theſe, with the true and legal notion, of the proceeding, namely, that the jury were in truth and conſtruction of law, the perſons who found the verdict containing both the law and the fact; that the judge was their *aſſiſtant* therein to adviſe the former; ſo that now, as in the early times of our law, the jury find both the law and fact, upon a general iſſue.

The obſervations, I have ventured to ſtate to your lordſhip, on the trial of a general iſſue, have been confined to civil caſes; and I choſe to begin with them, partly becauſe the antient examples, and particularly the ſtatute Weſtminſter 2d. belonged to civil actions; but chiefly, becauſe, whatever I may eſtabliſh upon the head of civil trials, will *a fortiori* be true as to criminal ones; for if the legal hiſtory of a trial of the general iſſue is the ſame in matters of crime, the leaving the law to be found by the jury in ſuch caſes, is leſs hardſhip upon them; the conſtruction the law puts upon criminal acts being leſs artificial and complex, than that which it puts on civil tranſactions; a man who would not readily comprehend the legal notion of a deſcent, an entry, or a feoffment, might ſoon be ſatisfied of the whole law,

upon

upon the ſubject of robbery, burglary, larceny, *libel*, and the like.

That the condition of the judge and jury, upon the trial of the general iſſue, in matters of crime, was the ſame, as has been juſt ſtated in civil iſſues, is well known to thoſe, who have looked into the hiſtory of our law; and little need be ſaid on this head, in addition to what I have before ſubmitted on the nature of civil trials. We know, that the guilt of a man was tried by the duel, that juries were ſubſtituted in the place of that barbarous judicature, about the ſame time, and in the ſame degree, as the like improvements were made in trying matters of property; and no more difference was introduced after this trial paſſed from the batoon to the verdict, as to the relative ſituation of the judge, than in civil trials; the pleading was exactly the ſame, becauſe regulated by the maxim ſo often mentioned, accompanied with the expoſition of it I have before given. If the defendant alledged matter of law, and reſted upon it, *he prayed the judgement of the court*; if he pleaded the general iſſue, by denying his guilt, *he put himſelf upon the country* for the truth of it. The jury therefore were the tribunal he looked to for the elucidation of his innocence, and the law upheld him in the choice he had made, when by the mouth of the cryer it is wiſhed *that God might ſend him a good deliverance*. But, if a judge, acting upon the new fangled conſtruction of that old poſition of law, ſhould take part of the iſſue to himſelf, telling the jury they have nothing to do with it, becauſe it is a point of law; in vain has the defendant put himſelf *upon his country*, the hopes of his *deliverance* are diſappointed, and the jury who have been ſworn *well and truly to try and true deliverance make between the king and the defendant*, are thus rendered ridiculous; part of the iſſue being wreſted from them, and taken to another tribunal, which the law knows not; ſo that, altogether, this would not be a trial by jury, but a trial by the *judge* and *the jury*, having diſtinct and independent authority, excluſive of each other; one to enquire of the fact, and the other of the law; a tribunal which I truſt, I have ſhewn, is not warranted by the principles of our antient law, nor reconcileable

concileable to any true notion of judicial proceedings in this country.

This point is the very gift of the queſtion, now before the court to determine, and I mean to contend unequivocally, and as a neceſſary concluſion from what I have ſaid that the law of England (paradoxical as it may ſeem) knows no ſuch trial as that by *judge and jury*; or in other words, that, in all queſtions ſent to a jury to be tried, the jury are the only known judges of that queſtion, whether it turns upon law or fact; and the judge has no lawful authority, to interpoſe, but by advice; which implies that, this, like all other advice, may be rejected by thoſe, who are at liberty, and chuſe to act without it. The judge, notwithſtanding the rank of his office, and the advantage he derived from his knowledge of the law, over thoſe who were the real *tryers* of the iſſue, yet being allowed to interfere with *advice*, only when called upon by the jury, as expreſſed by Stat. 2. Weſtm. evidently was placed in a ſecondary light.—The law, in an inſtance, a little ſimilar to this, has given an opinion upon the relative character of ſuch *aſſiſtants and adviſers* to the proper judge of a court; your lordſhip knows, that by Stat. 3. Hen. vii. c. for new modelling the Star Chamber, it was ordained, that the chancellor, treaſurer, privy ſeal, or two of them, *calling to them* a lord ſpiritual and temporal of the council, ſhould determine upon riots and other offences there mentioned. Upon this ſtatute it became a queſtion, whether the lords ſpiritual and temporal ſo *called in* were judges of this court; and it was held by all the juſtices in the time of Henry vii. that they were not; but only *aſſiſtant and aiding* to the chancellor, treaſurer, or privy ſeal or two of them, who were the only judges.—Now, my lord, by *judge* in this caſe we muſt underſtand the power *to try and determine*; and if a queſtion had been put to thoſe judges, on the nature of a trial on the general iſſue, what would they have ſaid? they muſt upon the ſame principle have pronounced the judge who was preſent to adviſe, to be only aſſiſtant and aiding; and not properly a *judge* of the matter in queſtion: and therefore, of courſe, that the ſole power to try and determine reſted in

in the jury. Indeed the language of the law uniformly corresponds with this idea—while the jurors were conſidered as the perſons *to try* the diſſeiſin; the judge had only a commiſſion *ad capiandas aſſiſas*, to take the aſſize or verdict of the jurors, as if his ſituation on that occaſion, was only to aid and aſſiſt; in a way, however, ſomewhat more than miniſterial. And that this is the ſituation of a judge, when *trying* an iſſue (as the common expreſſion is but, as I beg leave to contend, when the jury are trying an iſſue,) ſeems to have been the opinion of all conſtitutional lawyers, and of every judge in this country, whoſe name and memory we are taught to revere.

When a burglary, robbery, or the like is trying, your lordſhips, in your addreſs to the jury, explain to them the law ariſing upon the facts, and after ſuch *advice*, you leave both to be tried and determined by the jury; inſtances of this kind are familiar to us all; and ſome of us have been witneſſes to caſes, in which the jury have taken upon them to diſregard the *advice* of the judge; and find a general verdict in oppoſition to it; when this happens, who will ſay there is a remedy? your lordſhips know there is none; and that is a circumſtance of itſelf ſufficient to ſhew, they acted within the limits of their province.

On a late occaſion, the relative ſituation of the judge and jury in criminal trials, appears to me, to have been fully recognized and explained by a judge of very diſtinguiſhed learning and talents, and whoſe opinion I may venture to ſay, will not be diſregarded by your lordſhips. This was in the trial of Col. Gordon, at the Old Bailey. My learned friend has already with great force of obſervation, taken notice of this caſe; I ſhall, therefore, forbear to trouble the court with the particulars of it again.

It is, my lord, in oppoſition to all theſe authorities, to hiſtory, to law, and to plain ſenſe; that upon the trial of this indictment, as well as a few ſimilar caſes, (all of which I hope from this day, will be conſidered as waſte paper in our report books,) a different practice has been introduced: and the matter which ought to go to the jury for them to try and determine, has been mutilated,

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and made eſſentially defective. Inſtead of the jury being *adviſed*, whether the publication in queſtion, was in point of law a libel or not, according to the practice of all judges in other cirminal matters; inſtead of the fact and the law being committed to the jury together; that, in the intelligent words of Mr. Baron Eyre, *they might compound their verdict out of both*, the jury, in the preſent inſtance, were told, they had nothing to do *with the libel*, but *that* was to be decided upon by the court.

This, my lord, if I do not groſsly err, is ſuch a deception on the expectations and privileges of defendants who have put themſelves upon their country, that, who is there but muſt feel himſelf ſeriouſly alarmed at it? it is not only the cauſe of my client, but the cauſe of every man who may unhappily become the object of any criminal proſecution; the doctrine ſtrikes deep; it extends to the whole penal code; there can be no trial at the Old Bailey, where the jury may not be told in the ſame manner, as on this occaſion. "The burglary conſiſts of "law and fact; you are to try the fact of breaking and "ſtealing; you will ſay if the property is proved as laid "in the indictment, but whether this is a burglary "belongs to the court to determine; I ſhall reſerve it "for the opinion of the judges."

One reaſon given by the learned judge in the preſent caſe, for not leaving the matter of libel to the conſideration of the jury is, *that the whole appears upon the record*; I do not, with great ſubmiſſion, admit the juſtneſs of this reaſon; becauſe it is making a circumſtance purely accidental, a motive for altering the eſtabliſhed method of trying offences; and if it is a reaſon, the ſame reaſon exiſts, in an indictment for perjury; though I fancy, no judge ever made this uſe of it: the ſame reaſon might be introduced into indictments for all offences; for a proſecutor, inſtead of confining himſelf to the preſent ſhort method of indicting for larceny, might alledge every particular movement in the proceſs of picking a pocket; and the judge might then ſay, with the ſame propriety, as in the preſent inſtance; "The caſe is all "upon the record, it is therefore very proper to leave it "to the court to determine, whether in point of law it "is within the ſtatute of Elizabeth." But leſt we

ſhould

ſhould fail of making the application of the precedent, as it ſtood upon its own ground, ſingly, and by itſelf, the law is here laid down in a way that puts all your lordſhips under a like reſtraint; not only where the indictment contains the whole offence, but in all indictments whatſoever. The learned judge ſays, *whatever appears upon the record is not for our deciſion here.*

My lord, I know that the *where* and the *whereas* of pleading is not ſuch a part of the record, as is to be decided upon at *niſi prius*; but, my lord, the crime appears upon the record, and the defendant ſays he is not guilty of it; and the jury are to try if he is; this, ſurely, is to be decided upon; or the judge and jury meet there for no purpoſe at all. But "*it may be decided upon hereafter.*" I anſwer, ſo it might have been then, as I truſt your lordſhips will determine, and in ſo determining, you will juſtify that maxim of the law, which ſays, *Fruſtra per plura quæritur quod fieri poſſit per pauciora.* When the law ſays, my client ought to have been left to the judgment of his country, why is he brought up to the bar of this court, to conteſt the ſame point, which might, in the proper courſe of things, have been decided in the firſt inſtance?

But the learned judge has given another reaſon for this. It is a reaſon, indeed, which I own, would not have occured to me, and which I beg leave, with that deference which belongs to my ſituation, to proteſt againſt. He ſays, ſpeaking almoſt in the language of the counſel for the proſecution. "If I was to give an opinion "here, that it was not a libel and you adopted it." That is; if you were to acquit the defendant; what then? "you *deprive* the *ſubject* of that which is one of "his *deareſt birth-rights*, you *deprive* him of his *writ of* "*error.*"

Your lordſhip has heard of *private vices* being *public benefits*; but whoever conceived that *public vices* were *private benefits*? The law of the latter poſition, is ſurely as incorrect as the morality of the former; for this doctrine puſhed to its full extent, ſuppoſes that the proſecutor of a public crime has a ſort of intereſt, or ſtake, in the enquiry, further than the ends of juſtice, and that the judge ſhould ſhew a ſort of tenderneſs for the preſerva-

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tion of it. Whereas it is the humane language of our law, that the judge ſhould be counſel for the criminal, and ſo far has this judicial mercy been indulged, that I have ſeen judges blink very hard indeed, to avoid any infringement of it.

Not to be tedious; I truſt I have ſhewn, to the ſatisfaction of your lordſhip and the court, that upon the trial of the general iſſue of not guilty, the jury are the proper judges *both of the law and fact*. That the duty of the judge upon the bench is to *adviſe* them in finding that law and fact. That if he takes the matter of law wholly from the jury, to be decided in another place, as he takes part of the matter of enquiry from the jury, the trial is incompleat, and the verdict ſo of courſe.

I will no longer delay the judgment of the court.

I ſit down, aſſured that your lordſhip will grant a new trial. If I ſhall find myſelf diſappointed in my expectation; and the doctrines which I have weakly endeavoured to combat, ſhall, this day, be pronounced to be the fixed and unalterable law of the land, I ſhall then moſt ſeriouſly lament. And, in the midſt of my great concern hereafter, it will afford my mind but little conſolation, to reflect, that by your lordſhip's great favour and indulgence, it has been permitted me, for a few minutes, to avert—the heavieſt blow which, in my conſcience, I ſhall think the liberties of the people of England have ever received.

FINIS.